UNIFORM LAW CONFERENCE OF CANADA

CONFERENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

PROCEEDINGS

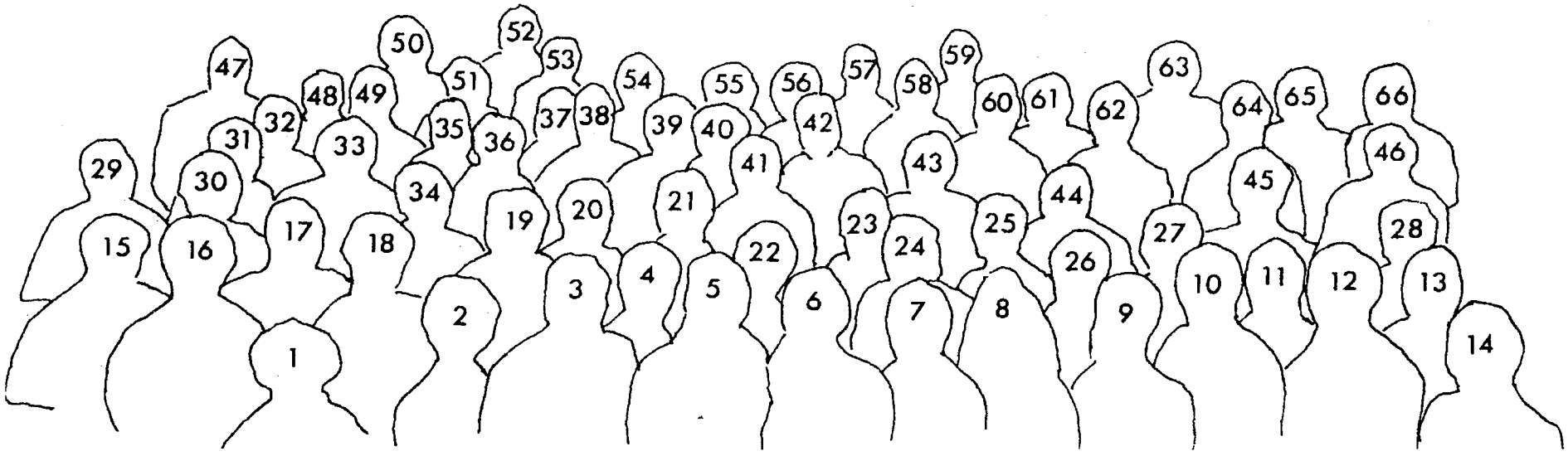
OF THE

SEVENTIETH ANNUAL MEETING

HELD AT

TORONTO, ONTARIO

August, 1988



1. Rasmussen, Sask.
2. Not identified
3. Walker, N.S.
4. Pagano, Alta.
5. Letourneau, Can.
6. Gregoire, Que.
7. Morton, Ont.
8. Jackson, Sask.
9. Fyfe, N.W.T.
10. Johnson, Can.
11. Schnoor, Man.
12. Johnson, N.S.
13. Fruchtman, Ont.
14. Gorman, Nfld.
15. Dalton, Alt.
16. Thompson, Can.
17. McCrank, Alta.
18. McCarthy, Nfld.
19. Lown, Alta.
20. Curran, Nfld.
21. Green, Nfld.
22. Sanders, N.W.T.
23. Pollack, Can.
24. Armstrong, N.W.T.
25. Beecroft, Ont.
26. Edwards, Man.
27. Murray, N.B.
28. Gervais, Que.
29. Moen, Sask.
30. Conrad, N.S.
31. Watt, B.C.
32. Close, B.C.
33. Peck, B.C.
34. Brown, Sask.
35. Isaac, Can.
36. Yacowar, B.C.
37. Einbinder-Miller, Can.
38. Not identified
39. Douglas, Ont.
40. Bordeleau, Que.
41. Martin, Ont.
42. Bouchard, Que.
43. Casey, Ont.
44. Guy, Man.
45. Cossete, Que.
46. Thornton, Sask.
47. Gale, N.S.
48. Longtin, Que.
49. Cochrane, Ont.
50. Paquette, Que.
51. Revell, Ont.
52. Breithaupt, Ont.
53. Not identified
54. Gunn, Sask.
55. Proulx, Can.
56. Tremblay, Can.
57. Godin, N.B.
58. Zigayer, Can.
59. Langille, P.E.I.
60. Hubley, P.E.I.
61. Bellemare, Can.
62. Dionne, Que.
63. Weinstein, Man.
64. Fox, Sask.
65. Stapleton, N.B.
66. Hodges, Sask.

Absent: *Alta.* McCuaig, Pringle; *B.C.* Kuzma: *Can.* Becker, Bélanger, Côte, Davidson, Del Buono, du Plessis, Mosley, Piragoff, Préfontaine, Rivard, Trahan, Williams; *Man.* Dawson; *N.B.* Doleman, Lalonde; *Nfld.* Hyslop, Kipnis, Lake, Noel; *N.W.T.* Marshall; *N.S.* Fried, Mosher; *Ont.* Blacklock, Chaloner, Greenspan, Griffiths, Hopkins, Hunt, MacKinnon, Mifsud, Perkins, Tucker, Wood, Yurkow; *P.E.I.* Moore; *Que.* Allaire; *Yukon*, Horton.

CONTENTS

Tables PAGE

PAST PRESIDENTS

SIR JAMES AIKINS, K.C., Winnipeg (five terms)	1918-1923
MARINER G. TEED, K.C., Saint John	1923-1924
ISAAC PITBLADO, K.C., Winnipeg (five terms)	1925-1930
JOHN D. FALCONBRIDGE, K.C., Toronto (four terms)	1930-1934
DOUGLAS J. THOM, K.C., Regina (two terms)	1935-1937
I. A., HUMPHRIES, K.C., Toronto	1937-1938
R. MURRAY FISHER, K.C., Winnipeg (three terms)	1938-1941
F. H. BARLOW, K.C., Toronto (two terms)	1941-1943
PETER J. HUGHES, K.C., Fredericton	1943-1944
W. P. FILLMORE, K.C., Winnipeg (two terms)	1944-1946
W. P. J. O'MEARA, K.C., Ottawa (two terms)	1946-1948
J. PITCAIRN HOGG, K.C., Victoria	1948-1949
HON ANTOINE RIVARD, K.C., Quebec	1949-1950
HORACE A. PORTER, K.C., Saint John	1950-1951
C. R. MAGONE, Q.C., Toronto	1951-1952
G. S. RUTHERFORD, Q.C., Winnipeg	1952-1953
LACHLAN MACTAVISH, Q.C., Toronto (two terms)	1953-1955
H. J. WILSON, Q.C., Edmonton (two terms)	1955-1957
HORACE E. READ, O.B.E., Q.C., LL.D., Halifax	1957-1958
E. C. LESLIE, Q.C., Regina	1958-1959
G. R. FOURNIER, Q.C., Quebec	1959-1960
J. A. Y. MACDONALD, Q.C., Halifax	1960-1961
J. F. H. TEED, Q.C., Saint John	1961-1962
E. A. DRIEDGER, Q.C., Ottawa	1962-1963
O. M. M. KAY, C.B.E., Q.C., Winnipeg	1963-1964
W. F. BOWKER, Q.C., LL.D., Edmonton	1964-1965
H. P. CARTER, Q.C., St. John's	1965-1966
GILBERT D. KENNEDY, Q.C., S.J.D., Victoria	1966-1967
M. M. HOYT, Q.C., B.C.L., Fredericton	1967-1968
R. S. MELDRUM, Q.C., Regina	1968-1969
EMILE COLAS, K.M., C.R., LL.D., Montreal	1969-1970
P. R. BRISSENDEN, Q.C., Vancouver	1970-1971
A. R. DICK, Q.C., Toronto	1971-1972
R. H. TALLIN, Winnipeg	1972-1973
D. S. THORSON, Q.C., Ottawa	1973-1974
ROBERT NORMAND, Q.C., Quebec	1974-1975
GLEN ACORN, Q.C., Edmonton	1975-1976
WENDALL MACKAY, Charlottetown	1976-1977
H. ALLAN LEAL, Q.C., LL.D., Toronto	1977-1978
ROBERT G. SMETHURST, Q.C., Winnipeg	1978-1979
GORDON F. COLES, Q.C., Halifax	1979-1980
PADRAIG O'DONOGHUE, Q.C., Whitehorse	1980-1981
GEORGE B. MACAULAY, Q.C., Victoria	1981-1982
ARTHUR N. STONE, Q.C., Toronto	1982-1983
SERGE KUJAWA, Q.C., Regina	1983-1984

GÉRARD BERTRAND, c.r., Ottawa 1984-1985
GRAHAM D. WALKER, Q.C., Halifax 1985-1987
M. RÉMI BOUCHARD, Sainte-Foy 1987-1988

OFFICERS:1988-89

Honorary President ..... Graham D. Walker, Q.C., Halifax
President ..... Georgina R. Jackson, Regina
1st Vice-President ..... Basil D. Stapleton, Q.C., Fredericton
2nd Vice-President ..... Daniel C. Préfontaine, c.r., Ottawa
Treasurer ..... Peter Pagano, Edmonton
Secretary ..... Howard F. Morton, Q.C., Toronto
Ex Officio ..... Merrilee Rasmussen, Regina
Ex Officio ..... Jean-François Dionne, Sainte-Foy

UNIFORM LAW SECTION

Chairman ..... Basil D. Stapleton, Q.C., Fredericton
Secretary ..... Melbourne M. Hoyt, Q.C., Fredericton

CRIMINAL LAW SECTION

Chairman ..... Jean-François Dionne, Sainte-Foy
Secretary ..... Michael E. N. Zigayer, Ottawa

LEGISLATIVE DRAFTING SECTION

Chairman ..... Merrilee Rasmussen, Regina
Vice-Chairman ..... Peter Pagano, Edmonton
Secretary ..... Jean Allaire, Sainte-Foy

LOCAL SECRETARIES

Alberta ..... Clark W. Dalton
British Columbia ..... Clifford S. Watt
Canada ..... Serge Lortie
Manitoba ..... Shirley Strutt
New Brunswick ..... Basil D. Stapleton, Q.C.
Newfoundland ..... John Noel
Northwest Territories ..... Geoffrey M. Bickert
Nova Scotia ..... Graham D. Walker, Q.C.
Ontario ..... Donald L. Revell
Prince Edward Island ..... M. Raymond Moore
Quebec ..... Marie-José Longtin
Saskatchewan ..... Doug Moen
Yukon Territory ..... Syd Horton

(For addresses of the above, see List of Delegates, page 6.)

EXECUTIVE SECRETARY

Melbourne M. Hoyt, Q.C.
Centennial Building
670 King St.
P.O. Box 6000
Fredericton, N.B. E3B 5H1
(506) 453-2226

DELEGATES

1988 Annual Meeting

The following persons (102) attended one or more of the Seventieth Meeting of the Conference

Legend

(L.D.S.) Attended the Legislative Drafting Section.
(U.L.S.) Attended the Uniform Law Section.
(C.L.S.) Attended the Criminal Law Section.

Alberta:

CLARK W. DALTON, Director, Legal Research and Analysis, Attorney General's Department, 4th Floor, Bowker Building, 9833-109th Street, Edmonton T5K 2E8 [403-427-5110] *(U.L.S.)*

PROFESSOR P. J. M. LOWN, Director, Institute of Law Research and Reform, 402 Law Centre, The University of Alberta, Edmonton T6G 2H5 [403-432-5291] *(U.L.S.)*

NEIL MCCRANK, Assistant Deputy Minister (Criminal Justice), Attorney General's Department, 2nd Floor, Bowker Building, 9833-109th Street, Edmonton T5K 2E8 [402-427-5046] *(C.L.S.)*

R. GARY MCCUAIG, Assistant Chief Crown Prosecutor, Criminal Justice Division, Attorney General's Department, 6th Floor, J. E. Brownlee Building, 10365-97th Street, Edmonton T5J 3W7 [403-427-7881] *(C.L.S.)*

PETER PAGANO, Chief Legislative Counsel, Attorney General's Department, 2nd Floor, Bowker Building, 9833-109th Street, Edmonton T5K 2E8 [403-427-2217] *(L.D.S. & U.L.S.)*

ALEX PRINGLE, Barrister and Solicitor, Pringle, Brimacombe and Sanderman, 2203, 10104-103rd Avenue, Edmonton T5J 0H8 [403-424-5156] *(C.L.S.)*

British Columbia:

ARTHUR CLOSE, Chairman, Law Reform Commission of British Columbia, Suite 601, Chancery Place, 865 Hornby Street, Vancouver V6Z 2H4 *(U.L.S.)*

OLEH KUZMA, Deputy Regional Crown Counsel, Criminal Justice Branch, Ministry of the Attorney General, Parliament Buildings, Victoria V8V 1X4 *(C.L.S.)*

RICHARD PECK, Q.C., Barrister & Solicitor, Robertson, Peck, Thompson & Casilio, #800, 1200 Burrard Drive, Vancouver V6Z 2C7 *(C.L.S.)*

CLIFFORD S. WATT, Acting Chief Legislative Counsel, Ministry of the Attorney General, Parliament Buildings, Victoria V8V 1X4 *(L.D.S. & U.L.S.)*

HAL YACOWAR, Director of Policy and Support Services, Criminal Justice Branch, Ministry of the Attorney General, Parliament Buildings, Victoria V8V 1X4 *(C.L.S.)*

Canada:

CAL BECKER, Director General, Executive Services, Ministry of the Solicitor General, 340 Laurier Avenue West, Ottawa K1A 0P8 [613-991-2944] *(C.L.S.)*

JEAN-CHARLES BÉLANGER, Conseiller législatif, Section de la législation, Ministère de la Justice, 344 rue Wellington, Bureau 2101, Ottawa K1A 0H8 [613-957-0031] *(U.L.S.)*

DANIEL E. BELLEMARE, Directeur, Section de la politique en matière de droit pénal, Ministère de la Justice, 239 rue Wellington, Ottawa K1A 0H8 [613-957-4728] *(C.L.S.)*

LOUIS-PHILIPPE CÔTÉ, Parliamentary Counsel, Office of the Law Clerk and Parliamentary Counsel, House of Commons, Room 606, La Promenade Building, Ottawa [613-992-1958] *(L.D.S.)*

DIANE DAVIDSON, Senior Parliamentary Counsel, Office of the Law Clerk and Parliamentary Counsel, House of Commons, Room 451-N, Ottawa K1A 0A6 [613-992-1511] *(L.D.S.)*

VINCENT M. DEL BUONO, Senior Counsel, Sentencing Group, Department of Justice, 239 Wellington Street, Ottawa K1A OH8 [613-957-4724] *(C.L.S.)*

RAYMOND L. DU PLESSIS, Q.C., Law Clerk and Parliamentary Counsel, The Senate, 140 Wellington Street, Suite 907, Ottawa K1A 0A4 [613-992-2416] *(L.D.S.)*

JULIUS ISAAC, Assistant Attorney General, Criminal Law, Department of Justice, 239 Wellington Street, Ottawa K1A 0H8 [613-957-4756] *(C.L.S.)*

PETER JOHNSON, Chief Legislative Counsel, Department of Justice, 344 Wellington Street, Room 2040, Ottawa K1A 0H8 [613-957-0013] *(U.L.S.)*

GILLES LÉTOURNEAU, Vice-president, Commission de réforme du droit du Canada, 130 rue Albert, Ottawa K1A 0L6 [613-996-2284] *(C.L.S.)*

RHONA MILLER, Senior Counsel, Legislation Section, Department of Justice, 344 Wellington Street, Room 2101, Ottawa K1A 0H8 [613-957-0047] *(C.L.S.)*

RICHARD G. MOSLEY, Senior General Counsel, Policy, Programs and Research Branch, Department of Justice, 239 Wellington Street, Ottawa K1A 0H8 [613-957-4725] *(C.L.S.)*

DONALD K. PIRAGOFF, General Counsel, Policy, Programs and Research Branch, Department of Justice, 239 Wellington Street, Ottawa K1A 0H8 [613-957-4730] *(C.L.S.)*

ROCKY POLLACK, Canadian Bar Assocation, 240 Graham Avenue, Winnipeg R3C 0J7 [204-942-0501] *(C.L.S.)*

DANIEL C. PRÉFONTAINE, c.r., Sous-ministre adjoint, Direction de la politique, des programmes et de la recherche, Ministère de la Justice, 239 rue Wellington, Ottawa K1A 0H8 [613-957-4701] *(C.L.S.)*

MICHEL PROULX, Proulx, Barot and Masson, 1080 Côte du Beaver Hall, Suite 1001, Montréal H2Z 1S8 [514-866-7995] *(C.L.S.)*

GLEN RIVARD, Senior Counsel, Policy, Programs and Research Branch, Department of Justice, 239 Wellington Street, Ottawa K1A 0H8 [613-957-4717] *(U.L.S.)*

EDWARD THOMPSON, Senior General Counsel, Toronto Regional Office, Department of Justice, 1 Front Street West, Suite 500, Toronto M5J 1A5 [416-973-3102] *(C.L.S.)*

ANNE-MARIE TRAHAN, Sous-ministre associée, Ministère de la Justice, 239 rue Wellington, Ottawa K1A 0H8 [613-957-4660] *(U.L.S.)*

GÉRALD TREMBLAY, Avocat, Clarkson et Tétrault, 1170 rue Peel, 5e étage, Montréal H3B 4S8 [613-397-4157] *(U.L.S.)*

GINETTE WILLIAMS, Counsel, Privy Council Office Section, Department of Justice, 344 Wellington Street, Room 2152, Ottawa K1A 0H8 [613-957-0065] *(U.L.S.)*

MICHAEL E. H. ZIGAYER, Counsel, Policy, Programs and Research Branch, Department of Justice, 239 Wellington Street, Ottawa K1A 0H8 [613-957-4736] *(C.L.S.)*

Manitoba:

ELEANOR R. DAWSON, Aikens, MacAulay & Thorvaldson, Barristers and Solicitors, Thirtieth Floor, Commodity Exchange Tower, 360 Main Street, Winnipeg R3C 4G1 *(U.L.S.)*

POFESSOR CLIFF EDWARDS, Chairman, Law Reform Commission, Faculty of Law, University of Manitoba, Winnipeg R3T 2N2 *(U.L.S.)*

JOHN P. GUY, Q.C., Acting Deputy Attorney General, Department of the Attorney General, 110 Legislative Building, 450 Broadway, Winnipeg R3C 0V8 *(C.L.S.)*

JEFFREY A. SCHNOOR, Director of Legal Research, Manitoba Law Reform Commission, 521-405 Broadway, Winnipeg R3C 3L6 *(U.L.S.)*

HYMIE WEINSTEIN, Q.C., Barrister and Solicitor, Skwart, Myers, Baizley & Weinstein, 724-240 Graham Avenue, Winnipeg R3C 0J7 *(C.L.S.)*

New Brunswick:

ELAINE E. DOLEMAN, Legislative Counsel, Department of Justice, P.O. Box 6000, Fredericton E3B 5H1 [506-453-2544] *(L.D.S.)*

RONALD GODIN, Barrister & Solicitor, Robichaud, Godin, Gallagher, P.O. Drawer Y, Bathurst E2A 3Z6 [506-458-8821] *(C.L.S.)*

BRUNO LALONDE, Conseiller legislatif associe, C.P. 6000, Fredericton E3B 5H1 [506-453-2855] *(L.D.S.)*

ROBERT MURRAY, Director of Prosecutions, Department of Justice, P.O. Box 6000, Fredericton E3B 5H1 [506-453-2784] *(C.L.S.)*

BASIL D. STAPLETON, Q.C., Director of Law Reform, Department of Justice, P.O. Box 6000, Fredericton E3B 5H1 [506-453-2668] *(U.L.S.)*

Newfoundland:

CHRISTOPHER CURRAN, Executive Director, Newfoundland Law Reform Commission, 21 Church Hill, St. John's A1C 3Z8 *(U.L.S.)*

WAYNE GORMAN, Senior Crown Attorney, Crown Attorney's Officer, Grand Falls A2A 1W9 *(C.L.S.)*

DEREK GREEN, Q.C., Chairman, Newfoundland Law Reform Commission, 21 Church Hill, St. John's A1C 3Z8 *(U.L.S.)*

ROBERT HYSLOP, Q.C., Associate Deputy Attorney General, Department of Justice, Confederation Building, St. John's A1C 5T7 *(C.L.S.)*

WENDY KIPNIS, Legislative Counsel and Assistant Law Clerk, Office of the Legislative Counsel, Confederation Building, St. John's A1C 5T7 *(L.D.S.)*

CALVIN LAKE, Legislative Counsel and Assistant Law Clerk, Office of the Legislative Counsel, Confederation Building, St. John's A1C 5T7 *(L.D.S.)*

JOHN MCCARTHY, Director, Civil Division, Department of Justice, Confederation Building, St. John's A1C 5T7 *(U.L.S.)*

A. JOHN NOEL, Senior Legislative Counsel and Law Clerk of the House of Assembly, Office of the Legislative Counsel, Confederation Building, St. John's A1C 5T7 *(L.D.S.)*

Northwest Territories:

RALPH ARMSTRONG, Research Counsel to the Northwest Territories Committee on Law Reform, Box 1320, Yellowknife X1A 1V1 [403-920-6487] *(U.L.S.)*

ALEX FYFE, Legislative Counsel, Department of Justice, Government of the Northwest Territories, Box 1320, Yellowknife X1A 2L9 [403-873-7462] *(U.L.S.)*

HONOURABLE MR JUSTICE T. DAVID MARSHALL, Chairperson of the Northwest Territories, Committee on Law Reform, Box 1320, Yellowknife X1A 2L9 [403-920-6487] *(L.D.S.)*

NORA SANDERS, Director of Policy and Planning, Department of Justice, Government of the Northwest Territories, Box 1320, Yellowknife X1A 2L9 [403-920-6418] *(U.L.S.)*

Nova Scotia:

R. GERALD CONRAD, Q.C., Executive Director, Legal Services, Department of the Attorney General, P.O. Box 7, Halifax B3J 2L6 [902-424-4041] *(U.L.S.)*

ANNA J. FRIED, Registrar of Regulations, Department of the Solicitor General, P.O. Box 7, Halifax B3J 2L6 [902-424-6723] *(L.D.S. & U.L.S.)*

GORDON S. GALE, Q.C., Director, Criminal, Department of the Attorney General, P.O. Box 7, Halifax B3J 2L6 [902-424-4032] *(C.L.S.)*

GORDON C. JOHNSON, Legislative Counsel, P.O. Box 1116, Halifax B3J 2X1 [902-424-8941] *(U.L.S.)*

CHRISTINE A. MOSHER, Legislative Counsel, P.O. Box 1116, Halifax B3J 2X1 [902-424-8941] *(L.D.S. & U.L.S.)*

GRAHAM D. WALKER, Q.C., Chief Legislative Counsel, P.O. Box 1116, Halifax B3J 2X1 [902-424-8941] *(L.D.S. & U.L.S.)*

Ontario:

DOUGLAS BEECROFT, Counsel, Policy Development Division, Ministry of the Attorney General - 15th Floor, 18 King Street East, Toronto M5C 1C5 [416-965-2385] *(U.L.S.)*

JAMES BREITHAUPT, Q.C., Chairman, Ontario Law Reform Commission, 15th Floor - 18 King Street East, Toronto M5C 1C5 [416-965-4761] *(U.L.S.)*

JIM BLACKLOCK, Senior Counsel, Crown Law Office Criminal, Ministry of the Attorney General, 16th Floor - 18 King Street East, Toronto M5C 1C5 [416-965-9110] *(C.L.S.)*

JEFF CASEY, Senior Crown Counsel, Policy, Crown Law Office Criminal, Ministry of the Attorney General, 16th Floor - 18 King Street East, Toronto M5C 1C5 [416-965-9110] *(C.L.S.)*

RICHARD F. CHALONER, Deputy Attorney General, Ministry of the Attorney General, 18th Floor - 18 King Street East, Toronto M5C 1C5 [416-965-4724] *(U.L.S. & C.L.S.)*

MICHAEL COCHRANE, Counsel, Policy Development Division, Ministry of the Attorney General, 15th Floor - 18 King Street East, Toronto M5C 1C5 [416-965-9564] *(U.L.S.)*

NORMAN S. DOUGLAS, Regional Crown Attorney, Crown Attorney Algoma Judicial District, Ministry of the Attorney General, 440 Queen Street East, Sault Ste. Marie P6A 5A8 [705-759-9444] *(C.L.S.)*

EARL FRUCHTMAN, Counsel/Crown Law Policy, Ministry of the Attorney General, 12th Floor - 18 King Street East, Toronto M5C 1C5 [416-965-0949] *(C.L.S.)*

BRIAN H. GREENSPAN, Barrister & Solicitor, 3300 - 130 Adelaide Street West, Toronto M5H 3P5 [416-868-1755] *(C.L.S.)*

PAUL GRIFFITHS, Counsel, Attorney General Department, Robert Garran Offices, National Circuit, Barton ACT 2600, Australia [062-719111] *(U.L.S.)*

LAURA HOPKINS, Legislative Counsel, Ministry of the Attorney General, 1st Floor - 1401 Whitney Block, 99 Wellesley Street West, Toronto M7A 1A2 [416-965-2841] *(L.D.S.)*

DOUGLAS C. HUNT, Assistant Deputy Attorney General, Criminal Law Division, Ministry of the Attorney General, 18th Floor - 18 King Street East, Toronto M5C 1C5 [416-965-2834] *(C.L.S.)*

MARGARET MACKINNON, Legislative Counsel, Ministry of the Attorney General, 1st Floor - 1401 Whitney Block, 99 Wellesley Street West, Toronto M7A 1A2 [416-965-2841] *(L.D.S.)*

MICHAEL E. MARTIN, Director of Crown Attorneys, Ministry of the Attorney General, 18th Floor - 18 King Street East, Toronto M5C 1C5 [416-965-5879] *(C.L.S.)*

LUCINDA MIFSUD, Legislative Counsel, Ministry of the Attorney General, 1st Floor - 1401 Whitney Block, 99 Wellesley Street West, Toronto M7A 1A2 [416-965-2841] *(L.D.S.)*

HOWARD F. MORTON, Q.C., Senior Crown Counsel/Criminal Law Policy, Ministry of the Attorney General, 12th Floor - 18 King Street East, Toronto M5C 1C5 [416-965-0949] *(C.L.S.)*

CRAIG PERKINS, Deputy Director, Policy Development Division, Ministry of the Attorney General, 18th Floor – 18 King Street East, Toronto M5C 1C5 [416-965-9474] *(U.L.S.)*

DONALD L. REVELL, Senior Legislative Counsel, Ministry of the Attorney General, 1st Floor – 1401 Whitney Block, 99 Wellesley Street West, Toronto M7A 1A2 [416-965-2841] *(L.D.S.& U.L.S.)*

SIDNEY TUCKER, Deputy Senior Legislative Counsel, Ministry of the Attorney General, 1st Floor – 1401 Whitney Block, 99 Wellesley Street West, Toronto M7A 1A2 [416-965-2841] *(L.D.S.)*

MICHAEL WOOD, Legislative Counsel, Ministry of the Attorney General, 1st Floor – 1401 Whitney Block, 99 Wellesley Street West, Toronto M7A 1A2 [416-965-2841] *(L.D.S.)*

RUSSELL YURKOW, Registrar of Regulations, Ministry of the Attorney General, 1st Floor – 1401 Whitney Block, 99 Wellesley Street West, Toronto M7A 1A2 [416-965-2841] *(L.D.S.)*

Prince Edward Island:

RICHARD B. HUBLEY, Director of Prosecutions and Chief Crown Prosecutor, Department of the Attorney General, Law Courts Building, Box 2200, Charlottetown C1A 8B9 *(C.L.S.)*

ROGER B. LANGILLE, Department Solicitor, Department of Justice, Box 2000, Charlottetown C1A 7N8 *(U.L.S.)*

RAYMOND MOORE, Legislative Counsel, P.O. Box 1628, Charlottetown C1A 7N3 *(L.D.S.)*

Quebec:

JEAN ALLAIRE, Directeur du Bureau des lois, Direction générale des Affaires législatives, Ministère de la Justice, 1200 Route de l'Église, Sainte-Foy G1V 4M1 [418-643-8782] *(L.D.S.)*

MYRIAM BORDELEAU, Substitut en chef du procureur général, Ministère de la Justice, 1 Notre-Dame, est, Montréal H2Y 1B6 [514-393-2703] *(C.L.S.)*

MICHEL BOUCHARD, Sous-ministre associé, Affaires criminelles et pénales, Ministère de la Justice, 1200 Route de l'Église, Sainte-Foy G1V 4M1 [418-643-4085] *(C.L.S.)*

ANDRÉ COSSETTE, Notaire conseil, Secteur du droit privé, Ministère de la Justice, 1200 Route de l'Église, Sainte-Foy G1V 4M1 [418-643-8782] *(U.L.S.)*

JEAN-FRANÇOIS DIONNE, Substitut en chef du procureur général et Directeur des affaires criminelles et pénales, Ministère de la Justice, 1200 Route de l'Église, Sainte-Foy G1V 4M1 [418-643-9059] *(C.L.S.)*

DENISE GERVAIS, Avocate conseil, Secteur du droit international, Ministère de la Justice, 1200 Route de l'Église, Sainte-Foy G1V 4M1 [418-643-9632] *(U.L.S.)*

DANIEL GRÉGOIRE, Conseiller juridique, Direction des affaires criminelles et pénales, Ministère de la Justice, 1200 Route de l'Église, Sainte-Foy G1V 4M1 [418-643-9059] *(C.L.S.)*

MARIE-JOSÉ LONGTIN, Directrice des Études et Orientations, Direction générale des Affaires législatives, Ministère de la Justice, 1200 Route de l'Église, Sainte-Foy G1V 4M1 [418-643-8782] *(U.L.S.)*

Saskatchewan:

IAN BROWN, Chief Legislative Crown Counsel, Legislative Drafting, Department of Justice, 1874 Scarth Street, Regina S4P 3V7 [306-787-9346] *(U.L.S.)*

AARON FOX, Shumiatcher-Fox, 2100 Scarth Street, Regina S4P 2H6 [306-352-2651] *(C.L.S.)*

ELLEN GUNN, Q.C., Executive Director, Public Prosecutions Division, Department of Justice, 1874 Scarth Street, Regina S4P 3V7 [306-787-5490] *(C.L.S.)*

KEN HODGES, Q.C., Director of Research, Law Reform Commission of Saskatchewan, 122-3rd Avenue North, Saskatoon S7K 2H6 [306-933-6127] *(U.L.S.)*

GEORGINA R. JACKSON, MacPherson, Leslie & Tyerman, Barristers & Solicitors, 15th Floor, 1874 Scarth Street, Regina S4P 4E9 [306-347-8430] *(U.L.S.)*

DOUG MOEN, Co-ordinator, Legislative Services Section, Department of Justice, 1874 Scarth Street, Regina S4P 3V7 [306-787-5360] *(U.L.S.)*

MERRILEE RASMUSSEN, Barrister and Solicitor, Rasmussen & Ozirny, 2816 Victoria Avenue, Regina S4T 1K5 [306-584-7702] *(L.D.S. & U.L.S.)*

ROBERT THORNTON, Priel, Stevenson, Hood and Thornton, 902 Spadina Crescent E., Saskatoon S7K 3H5 [306-244-0132] *(U.L.S.)*

Yukon:

SYDNEY B. HORTON, Chief Legislative Counsel, Department of Justice, Government of Yukon, P.O. Box 2703, Whitehorse Y1A 2C6 [403-667-5764] *(L.D.S. & U.L.S.)*

DELEGATES EX OFFICIO

1988 Annual Meeting

Attorney General for Alberta: HON KEN ROSTAD, Q.C.
Attorney General of British Columbia: HON BUD SMITH, Q.C.
Minister of Justice and Attorney General of Canada: HON RAY HNATYSHYN, P.C., M.P.
Attorney General of Manitoba: HON JAMES C. MCCRAE
Attorney General and Minister of Justice of New Brunswick: HON. JAMES LOCKYER, Q.C.
Minister of Justice and Attorney General of Newfoundland: HON LYNN VERGE, Q.C.
Minister of Justice of the Northwest Territories: HON MICHAEL A. BALLANTYNE
Attorney General of Nova Scotia: HON. TERENCE R. B. DONAHOE, Q.C.
Attorney General of Ontario: HON IAN G. SCOTT, Q.C.
Minister of Justice and Attorney General of Prince Edward Island: HON WAYNE D. CHEVERIE, Q.C.
Minister of Justice and Attorney General of Quebec: HON GIL REMILLARD
Minister of Justice and Attorney General for Saskatchewan: HON BOB ANDREW
Minister of Justice of the Yukon: HON ROGER KIMMERLY

HISTORICAL NOTE

Seventy years have passed since the Canadian Bar Association recommended that each provincial government provide for the appointment of commissioners to attend conferences organized for the purpose of promoting uniformity of legislation in the provinces.

The recommendation of the Canadian Bar Association was based upon, first, the realization that it was not organized in a way that it could prepare proposals in a legislative form that would be attractive to provincial governments, and second, observation of the National Conference of Commissioners on Uniform State Laws, which had met annually in the United States since 1892 (and still does) to prepare model and uniform statutes. The subsequent adoption by many of the state legislatures of these Acts has resulted in a substantial degree of uniformity of legislation throughout the United States, particularly in the field of commercial law.

The Canadian Bar Association's idea was soon implemented by most provincial governments and later by the others. The first meeting of commissioners appointed under the authority of provincial statutes or by executive action in those provinces where no provision was made by statute took place in Montreal on September 2nd, 1918, and there the Conference of Commissioners on Uniformity of Laws throughout Canada was organized. In the following year the Conference changed its name to the Conference of Commissioners on Uniformity of Legislation in Canada and in 1974 adopted its present name.

Although work was done on the preparation of a constitution for the Conference in 1918-19 and in 1944 and was discussed in 1960-61 and again in 1974, the decision on each occasion was to carry on without the strictures and limitations that would have been the inevitable result of the adoption of a formal written constitution.

Since the organization meeting in 1918 the Conference has met, with a few exceptions, during the week preceding the annual meeting of the Canadian Bar Association at or near the same place. The following is a list of the dates and places of the meetings of the Conference:

1918 Sept 2-4, Montreal
1919 Aug 26-29, Winnipeg
1920 Aug 30, 31, Sept 1-3, Ottawa
1921 Sept 2, 3, 5-8, Ottawa
1922 Aug 11, 12, 14-16, Vancouver
1923 Aug 30, 31, Sept 1, 3-5, Montreal
1924 July 2-5, Quebec
1925 Aug 21, 22, 24, 25, Winnipeg
1926 Aug 27, 28, 30, 31, Saint John
1927 Aug 19, 20, 22, 23, Toronto
1928 Aug 23-25, 27, 28, Regina
1929 Aug 30, 31, Sept 2-4, Quebec
1930 Aug 11-14, Toronto
1931 Aug 27-29, 31, Sept 1, Murray Bay
1932 Aug 25-27, 29, Calgary
1933 Aug 24-26, 28, 29, Ottawa
1934 Aug 30, 31, Sept 1-4, Montreal
1935 Aug 22-24, 26, 27, Winnipeg
1936 Aug 13-15, 17, 18, Halifax
1937 Aug 12-14, 16, 17, Toronto

1938 Aug 11-13, 15, 16, Vancouver
1939 Aug 10-12, 14, 15, Quebec
1941 Sept 5, 6, 8-10, Toronto
1942 Aug 18-22, Windsor
1943 Aug 19-21, 23, 24, Winnipeg
1944 Aug 24-26, 28, 29, Niagara Falls
1945 Aug 23-25, 27, 28, Montreal
1946 Aug 22-24, 26, 27, Winnipeg
1947 Aug 28-30, Sept 1, 2, Ottawa
1948 Aug 24-28, Montreal
1949 Aug 23-27, Calgary
1950 Sept 12-16, Washington, D C
1951 Sept 4-8, Toronto
1952 Aug 26-30, Victoria
1953 Sept 1-5, Quebec
1954 Aug 24-28, Winnipeg
1955 Aug 23-27, Ottawa
1956 Aug 28-Sept 1, Montreal
1957 Aug 27-31, Calgary
1958 Sept 2-6, Niagara Falls
1959 Aug 25-29, Victoria
1960 Aug 30-Sept 3, Quebec
1961 Aug 21-25, Regina
1962 Aug. 20-24, Saint John
1963 Aug 26-29, Edmonton
1964 Aug 24-28, Montreal
1965 Aug 23-27, Niagara Falls
1966 Aug 22-26, Minaki
1967 Aug 28-Sept 1, St John's
1968 Aug 26-30, Vancouver
1969 Aug 25-29, Ottawa
1970 Aug 24-28, Charlottetown
1971 Aug 23-27, Jasper
1972 Aug 21-25, Lac Beauport
1973 Aug 20-24, Victoria
1974 Aug 19-23, Minaki
1975 Aug 18-22, Halifax
1976 Aug 19-27, Yellowknife
1977 Aug 18-27, St Andrews
1978 Aug 17-26, St John's
1979 Aug 16-25, Saskatoon
1980 Aug 14-23, Charlottetown
1981 Aug 20-29, Whitehorse
1982 Aug 19-28, Montebello
1983 Aug 18-27, Quebec
1984 Aug 18-24, Calgary
1985 Aug 9-16, Halifax
1986 Aug 8-15, Winnipeg
1987 Aug 8-14, Victoria
1988 Aug 6-12, Toronto

Because of travel and hotel restrictions due to war conditions, the annual meeting of the Canadian Bar Association scheduled to be held in Ottawa in 1940 was cancelled and for the same reasons no meeting of the Conference was held in that year. In 1941 both the Canadian Bar Association and the Conference held meetings, but in 1942 the Canadian Bar Association cancelled its meeting which was scheduled to be held in Windsor. The Conference, however, proceeded with its meeting. This meeting was significant in that the National Conference of Commissioners on Uniform State Laws in the United States was holding its annual meeting at the same time in Detroit which enabled several joint sessions to be held of the members of both conferences.

While it is quite true that the Conference is a completely independent organization that is answerable to no government or other authority, it does recognize and in fact fosters its kinship with the Canadian Bar Association. For example, one of the ways of getting a subject on the Conference's agenda is a request from the Association. Second, the Conference names two of its executives annually to represent the Conference on the Council of the Bar Association. And third, the honorary president of the Conference each year makes a statement on its current activities to the Bar Association's annual meeting.

Since 1935 the Government of Canada has sent representatives annually to the meetings of the Conference and although the Province of Quebec was represented at the organization meeting in 1918, representa-

tion from that province was spasmodic until 1942. Since then, however, representatives of the Bar of Quebec have attended each year, with the addition since 1946 of one or more delegates appointed by the Government of Quebec.

In 1950 the then newly-formed Province of Newfoundland joined the Conference and named delegates to take part in the work of the Conference.

Since the 1963 meeting the representation has been further enlarged by the attendance of representatives of the Northwest Territories and the Yukon Territory.

In most provinces statutes have been providing for grants towards the general expenses of the Conference and the expenses of the delegates. In the case of those jurisdictions where no legislative action has been taken, representatives are appointed and expenses provided for by order of the executive. The members of the Conference do not receive remuneration for their services. Generally speaking, the appointees to the Conference are representative of the bench, governmental law departments, faculties of law schools, the practising profession and, in recent years, law reform commissions and similar bodies.

The appointment of delegates by a government does not of course have any binding effect upon the government which may or may not, as it wishes, act upon any of the recommendations of the Conference.

The primary object of the Conference is to promote uniformity of legislation throughout Canada or the provinces in which uniformity may be found to be possible and advantageous. At the annual meetings of the Conference consideration is given to those branches of the law in respect of which it is desirable and practicable to secure uniformity. Between meetings, the work of the Conference is carried on by correspondence among the members of the Executive, the Local Secretaries and the Executive Secretary, and, among the members of the *ad hoc* committees. Matters for the consideration of the Conference may be brought forward by the delegates from any jurisdiction or by the Canadian Bar Association.

While the chief work of the Conference has been and is to try to achieve uniformity in respect of subject matters covered by existing legislation, the Conference has nevertheless gone beyond this field on occasion and has dealt with subjects not yet covered by legislation in Canada which after preparation are recommended for enactment. Examples of this practice are the *Uniform Survivorship Act*, section 39 of the *Uniform Evidence Act* dealing with photographic records, and

section 5 of the same Act, the effect of which is to abrogate the rule in *Russell v. Russell*, the *Uniform Regulations Act*, the *Uniform Frustrated Contracts Act*, the *Uniform Proceeding's Against the Crown Act*, and the *Uniform Human Tissue Gift Act*. In these instances the Conference felt it better to establish and recommend a uniform statute before any legislature dealt with the subject rather than wait until the subject had been legislated upon and then attempt the more difficult task of recommending changes to effect uniformity.

Another innovation in the work of the Conference was the establishment of a section on criminal law and procedure, following a recommendation of the Criminal Law Section of the Canadian Bar Association in 1943. It was pointed out that no body existed in Canada with the proper personnel to study and prepare in legislative form recommendations for amendments to the *Criminal Code* and relevant statutes for submission to the Minister of Justice of Canada. This resulted in a resolution of the Canadian Bar Association urging the Conference to enlarge the scope of its work to encompass this field. At the 1944 meeting of the Conference a criminal law section was constituted, to which all provinces and Canada appointed representatives.

In 1950, the Canadian Bar Association held a joint annual meeting with the American Bar Association in Washington, D.C. The Conference also met in Washington which gave the members a second opportunity of observing the proceedings of the National Conference of Commissioners on Uniform State Laws which was meeting in Washington at the same time. It also gave the Americans an opportunity to attend sessions of the Canadian Conference which they did from time to time.

The interest of the Canadians in the work of the Americans and *vice versa* has since been manifested on several occasions, notably in 1965 when the president of the Canadian Conference attended the annual meeting of the United States Conference, in 1975 when the Americans held their annual meeting in Quebec, and in subsequent years when the presidents of the two Conferences have exchanged visits to their respective annual meetings.

The most concrete example of sustained collaboration between the American and Canadian conferences is the Transboundary Pollution Reciprocal Access Act. This Act was drafted by a joint American-Canadian Committee and recommended by both Conferences in 1982. That was the first time that we have joined in this sort of bilateral lawmaking.

An event of singular importance in the life of this Conference occurred in 1968. In that year Canada became a member of The Hague Conference on Private International Law whose purpose is to work for the unification of private international law, particularly in the fields of commercial law and family law.

In short, The Hague Conference has the same general objectives at the international level as this Conference has within Canada.

The Government of Canada in appointing six delegates to attend the 1968 meeting of The Hague Conference greatly honoured this Conference by requesting the latter to nominate one of its members as a member of the Canadian delegation. This pattern was again followed when this Conference was asked to nominate one of its members to attend the 1972, the 1976 and the 1980 meetings of The Hague Conference as a member of the Canadian delegation.

A relatively new feature of the Conference is the Legislative Drafting Workshop which was organized in 1968 and which is now known as the Legislative Drafting Section of the Conference. It meets for two days preceding the annual meeting of the Conference and at the same place. It is attended by legislative draftsmen who as a rule also attend the annual meeting. The section concerns itself with matters of general interest in the field of parliamentary draftsmanship. The section also deals with drafting matters that are referred to it by the Uniform Law Section or by the Criminal Law Section.

One of the handicaps under which the Conference has laboured since its inception has been the lack of funds for legal research, the delegates being too busy with their regular work to undertake research in depth. Happily, however, this want has been met by most welcome grants in 1974 and succeeding years from the Government of Canada.

A novel experience in the life of the Conference—and a most important one—occurred at the 1978 annual meeting when the Canadian Intergovernmental Conference Secretariat brought in from Ottawa its first team of interpreters, translators and other specialists and provided its complete line of services, including instantaneous French to English and English to French interpretation at every sectional and plenary session throughout the ten days of the sittings of the Conference.

BIBLIOGRAPHY

(arranged chronologically)

L'Association Du Bureau Canadien et L'Uniformité des Lois The Honourable Judge Surveyor 1923 Can Bar Rev , p 52

Uniformity of Legislation R W Shannon 1930 Can Bar Rev , p 28

Conference on Uniformity of Legislation in Canada Sidney Smith 1930 Can Bar Rev , p 593

Uniformity Coast to Coast—A Sketch of the Conference of Commissioners on Uniformity of Legislation in Canada Published by the Conference in 1943

Notes and Comments E H Silk, K C , Hon Valmore Bienvenue, K C , W P M Kennedy, 1943-44 U of Toronto L.J , pp 161, 164, 168

Securing Uniformity of Law in a Federal System—Canada John Willis, 1943-44 U of Toronto L J , p 352

Uniformity of Legislation in Canada—An Outline L R MacTavish, K C 1947 Can Bar Rev , p 36

Uniformity of Legislation in Canada (In English with French translation) Henry F Muggah 1956 Yearbook of the International Institute for the Unification of Private Law (UNIDROIT), P 104

Uniformity of Legislation in Canada (1957) (In English with French translation) Henry F Muggah 1957 Yearbook of the International Institute for the Unification of Private Law (UNIDROIT), p 240

Uniformity of Legislation in Canada—The Conditional Sales Experience Jacob Ziegel 39 Can Bar Rev , 1961, pp 165, 231

Conference of Commissioners on Uniformity of Legislation in Canada—Model Acts recommended from 1918 to 1961 Published by the Conference in 1962

La Conférence des Commissionaires pour l'uniformité de la législation au Canada (In French and English) J W Ryan and Gregoire Lehoux 1970 Yearbook of the International Institute for the Unification of Private Law (UNIDROIT), p 126 For a reprint of this article and for a list of the materials consulted in its preparation, *see* 1971 Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, p 414 For a review of this article, see Kurt H Nadelmann The American Journal of Comparative Law, Vol 12, No 2, Spring 1973

Consolidation of Uniform Acts of the Uniform Law Conference of Canada Published by the Conference in 1978 A loose-leaf collection with annual supplements

Preserving the Uniformity of Law Shiroky and Trebilcock Canadian Confederation at the Crossroads: The Search for a Federal-Provincial Balance The Fraser Institute, Vancouver 1978, pp 189-218

Uniform Law Conference of Canada W H Hurlburt, Q C Commonwealth Law Bulletin, Vol 5, No 1, Jan 1979, p 246 A paper presented to the Meeting of Commonwealth Law Reform Agencies held at Marlborough House, London, England

Consolidated Index Can Bar Rev Vols 1-50 (1923-1972)

Law Reform in Canada: Diversity or Uniformity Frank Muldoon 1983 12 Manitoba Law Journal, p 257

Law Reform in Canada: The Impact of the Provincial Law Reform Agencies on Uniformity Thomas Mapp 1983 Dalhousie Law Journal, p 277

Perspectives on the Harmonization of Law in Canada Volume 55 in the series of studies commissioned as part of the research program of the Royal Commission on the Economic Union and Development Prospects for Canada published by the University of Toronto Press

Harmonization of Business Law in Canada Volume 56 in the series of studies commissioned as part of the research program of the Royal Commission on the Economic Union and Development Prospects for Canada published by the University of Toronto Press

Harmonization of Provincial Legislation in Canada: The Elusive Goal W H Hurlburt, Q C Canadian Business Law Journal, Vol 12, 1986-87, p 387

Harmonization of Provincial Legislation in Canada Arthur L Close Canadian Business Law Journal, Vol 12, 1986-87, p 425

The American Experience on Harmonization (Uniformity) of State Laws. Morris Shanker Canadian Business Law Journal, Vol 12, 1986-87, p 433

LEGISLATIVE DRAFTING SECTION

MINUTES

Attendance

Thirty-one delegates were in attendance.

Opening

The meeting opened with the Chairman, Merrilee Rasmussen, presiding. Peter Pagano and Jean Allaire were elected to act as Vice-Chairman and Secretary respectively. Hours of sitting were set at 9:30 a.m. to 12:30 p.m. and 2:00 p.m. to 5:00 p.m. on Saturday and Sunday, August 6th and 7th, and an agenda was adopted.

Recording of Deliberations

It was agreed that the Conference Secretariat would record the deliberations of the meeting for internal use of the Conference only.

Adoption of Minutes

The minutes of the 1987 meeting of the Section were adopted. Donald Revell indicated that for various reasons he and Cornelia Shuh were unable to report at the 1988 meeting on the work of the committee charged with reviewing the legislative drafting protocol of the Conference.

Nominating Committee

Bruno Lalonde was appointed Chairman of the Nominating Committee, and Graham Walker agreed to sit with him on the Committee.

Procedure

On the basis of a letter addressed to Donald Revell by Arthur Stone dated January 18, 1988, the members of the Section discussed the reasons for the existence of the Legislative Drafting Section, its goals and its future.

> RESOLVED that the Purposes and Procedures Committee review both the purposes and the procedures of the Section and make recommendations with respect thereto and that the Committee report to the executive not later than January 31, 1989; and
>
> that the Committee be reconstituted to consist of Cliff Watt, Jean Allaire and Graham Walker

Draft Uniform Defamation Act

A draft Uniform Defamation Act was presented in French and English versions.

Miscellaneous Matters

The members of the Section discussed a number of matters of general interest. The topics covered included the following:

— Statements of purpose;
— Marginal notes;
— Placement of definitions;
— Numbering techniques;
— Consolidation of regulations.

Commonwealth Association of Legislative Counsel

Peter Pagano reported on the activities of the Commonwealth Association of Legislative Counsel.

Plain Language and Plain Drafting

Roger Kimmerly of the Yukon spoke to the members of the Section about the Yukon's experience with legislative drafting in plain language and simple style.

Officers

The Nominating Committee reported that for 1988-1989 the following persons be elected to the offices indicated:

Merrilee Rasmussen - Chairman
Peter Pagano - Vice-chairman
Jean Allaire - Secretary

Close

There being no further business, on motion duly made, the Section adjourned to meet again at the time of the next Uniform Law Conference or earlier at the call of the Chair.

SECTION DE RÉDACTION LÉGISLATIVE

PROCÈS-VERBAL

Présence

Trente et un délégués étaient présents.

Ouverture

La séance s'est ouverte sous la présidence de Merrillee Rasmussen. Peter Pagano et Jean Allaire avaient été élus pour agir respectivement comme vice-président et secrétaire. Il fut convenu que la section siégerait de 9 h 30 à 12 h 30 et de 2 heures à 5 heures samedi et dimanche, les 6 et 7 août et un ordre du jour fut adopté.

Enregistrement des débats

Il fut convenu que le Secrétariat des conférences enregistrerait les débats de la séance pour des fins de régie interne seulement.

Adoption du procès-verbal

Le procès-verbal de la séance de la Section, tenue en 1986, a été adopté. Donald Revell fait état de l'incapacité dans laquelle Cornelia Shuh et lui-même se trouvent, pour diverses raisons, de faire rapport, au cours de la séance de 1988, sur les travaux du comité chargé de réviser le protocole de rédaction législative de la Conférence.

Comité des nominations

Bruno Lalonde a été désigné président du comité des nominations et Graham Walker s'est joint à lui.

Buts et moyens

Sur la base d'une lettre adressée à Donald Revell par Arthur Stone le 18 janvier 1988, les membres de la section ont discuté de la raison d'être, des objectif et de l'avenir de la Section de rédaction législative.

IL FUT RŚOLU que le Comité des buts et moyens révise la procédure de la Section et fasse des recommandations, à cet égard, au comité exécutif de la Section, au plus tard le 31 janvier 1989

Que le comité soit nommé de nouveau et soit formé de Cliff Watt, Jean Allaire et Graham Walker

Projet de loi uniforme sur la diffamation

Un projet de loi uniforme sur la diffamation est déposé dans les deux versions.

Divers

Les membres de la Section ont échangé sur un certain nombre de sujets d'intérêt général.

Il fut question, notamment :

— des déclarations d'objets;
— des notes marginales;
— de l'emplacement des définitions;
— des techniques de numérotation;
— de la refonte des règlements.

Association des conseillers législatifs du Commonwealth

Peter Pagano fait rapport sur les activités de l'Association des conseillers législatifs des pays du Commonwealth.

Langage Simple et Rédaction Simple

Roger Kimmerley du Yukon entretient les membres de la section sur l'expérience du Yukon relativement à la rédaction législative dans un langage ordinaire et dans un style simple.

Officiers

Le Comité des nominations fait rapport et informe les participants que, pour l'annéee 1988-89, le Comité exécutif de la Section sera formée des personnes suivants :

Merrilee Rasmussen – Présidente
Peter Pagano – Vice-président
Jean Allaire – Secrétaire

Clôture de la séance

Les sujets à l'ordre du jour étant épuisés, sur proposition la séance est close et les participants conviennent de se réunir de nouveau à l'occasion de la tenue de la prochaine conférence sur l'uniformisation des lois, ou plus tôt, sur convocation de la présidente.

OPENING PLENARY SESSION

MINUTES

Opening of Meeting

The meeting opened at 8 p.m. on Sunday, August 7, in the King Edward Hotel, in Toronto with Georgina Jackson in the chair and Mel Hoyt as secretary.

Address of Welcome

The Acting President extended a warm welcome to all those delegates in attendance. The Deputy Attorney General for Ontario also welcomed all the delegates to Ontario and hoped an enjoyable time would be had by all.

Introduction of the Executive

The Acting President identified each officer of the Conference and named the office each one fulfills. She explained that she is 1st Vice-President of the Conference and is acting in place of Remi Bouchard who was elected President for the years 1987-88, but in the meantime has been appointed Senior Associate Chief Judge of the Court of the Session of the Peace for Quebec.

Introduction of Delegates

The Acting President asked the senior delegate from each jurisdiction to introduce himself and the other members of his delegation.

National Conference of Commissioners on Uniform State Laws

The President of the National Conference of Commissioners on Uniform State Laws, Mr. Michael P. Sullivan, and his wife Marilyn, were introduced to the Conference.

President's Report

At the executive meetings during the year, the Executive Committee considered a number of matters.

A matter of some debate was the continuation of the Committee on Personal Property Security legislation. It was a joint committee between the Canadian Bar Association and the Uniform Law Conference. The Executive decided, at least for the time being, to disband that committee and to await further developments in the area of Personal Property Security.

Mr. John Gregory was appointed to the Special Committee on Private International Law.

A major project of the Conference this year has been the work on the Human Tissue Gift Act. Funds were authorized from the Research Fund to support this project.

The Executive Committee has been talking further about the question of how best to draw to the attention of the Attorneys General the matters that the Conference has considered and how to ensure that the products of the Conference come before the legislators of Canada. We have been discussing distribution of pamphlet copies of the Acts and we believe this year we have a method whereby that kind of distribution can be effected.

The Acting President acknowledges the efforts of Mr. Frank Iacobucci, Deputy Minister of Justice in Ottawa, who at the December meeting of the Attorneys General and their deputies reviewed the resolutions of the civil and criminal sections.

The Executive Committee met today and will be meeting during the week to review further issues relating to the finances of the Conference.

One matter of concern continues to be the matter of communications among the various delegates. If you have communications that you wish distributed to the other memebers of the Conference, please ensure that your first point of contact is with the Executive Secretary. If time is of the essence and you must distribute matters to everyone and you want to use a courier service, you must make sure that the local secretaries are informed as to whom you are distributing the material to, and that the Executive Secretary knows that the matter is being distributed. If you wish a particular document to be translated, then special arrangements will have to be made with the Executive Secretary to have the Conference Secretariat translate the material.

The Acting President acknowledged the hospitality which the National Conference of Commissioners on Uniform State Laws extended to her during the past week at their annual meeting in Washington. It was a most worthwhile and informative experience. The Executive Committee will be discussing further ideas that one can gain from this very successful Conference.

Auditor's Report

The Treasurer presented the Auditor's Report regarding a statement of Receipts and Disbursements and Cash Position of the Conference as of June 30, 1988. It is set out in Appendix A, page 46.

RESOLVED

1 that the Auditor's Report be approved;

2 that the same auditors, Clarkson Gordon, be appointed auditors for the coming year; and

3 that the usual banking motion be passed authorizing the Treasurer to draw upon the Conference accounts

Appointment of Resolutions Committee

RESOLVED that a Resolutions Committee be constituted, composed of Ken Hodges as Chairman, Ralph Armstrong and Jean-François Dionne, whose report will be presented at the Closing Plenary Session

Appointment of Nominating Committee

RESOLVED that where there are five or more past presidents present at the meeting, the Nominating Committee shall be composed of all the past presidents present, but when fewer than five past presidents are present, those who are present shall appoint sufficient persons from among the delegates present to bring the Committee's membership up to five, and in either event the most recently retired President shall be Chairman

Future Meetings

The meeting next year is scheduled for the Northwest Territories in Yellowknife from August 10 to 18.

Events of the Week

Mr. Howard F. Morton, Q.C. gave us an outline of events for the week.

Adjournment

There being no further business, the meeting adjourned at 8:40 p.m. to meet again in the Closing Plenary Session on Thursday, August 11th.

UNIFORM LAW SECTION

MINUTES

Attendance

Forty-four delegates were in attendance. For details see list of delegates, page 6.

Sessions

The Section held eight sessions, two each day from Monday to Thursday, August 8-11, 1988.

Distinguished Visitor

The Section was honoured by the participation of Mr. Michael P. Sullivan, President of the National Conference of Commissioners on Uniform State Laws.

Arrangements of Minutes

A few of the matters discussed were opened one day, adjourned and concluded on another day. For convenience, the minutes are put together as though no adjournments occurred and the subjects are arranged alphabetically.

Opening

The session opened with Basil D. Stapleton as Chairman and Mel Hoyt as Secretary.

Hours of Sitting

It was resolved that the Section sit from 9:00 a.m to 12:30 p m and from 2 p m to 5:00 p m daily, subject to change as circumstances require.

Agenda

A tentative agenda was considered and the order of business for the week agreed upon.

Class Actions

The Ontario Commissioners presented a report on Class Actions as set out in Appendix B, page 49.

RESOLVED that the Ontario Commissioners' Report on Class Actions be received and printed in the Proceedings and that the matter be referred back to the Ontario Commissioners for a further report, draft Act and commentaries for discussion in 1989

Custody and Access Jurisdiction and Enforcement Act (Interprovincial Child Abduction Act)

The Quebec and Ontario Commissioners presented a report and draft Act on Custody and Access Jurisdiction and Enforcement Act as set out in Appendix C, page 106.

RESOLVED

1 that the draft Act from the Quebec and Ontario Commissioners on Custody and Access Jurisdiction and Enforcement Act be received and printed in the proceedings and that the draft Act be referred to the Legislative Drafting Section for a revised draft Act together with commentaries prepared by the Quebec and Ontario Commissioners; and

2 that the draft Act and commentaries be presented for adoption in 1989

Defamation

The Saskatchewan Commissioners presented a report and draft Act on Defamation as set out in Appendix D, page 127.

RESOLVED that the Saskatchewan Commissioner's report and draft Act on Defamation be received and printed in the Proceedings and that the draft Act be referred back to the Saskatchewan Commissioners for amendment and commentaries which are to be forwarded to the Legislative Drafting Section for adoption at the 1989 meeting

Extra-Provincial Child Welfare, Guardianship and Adoption Orders

The Alberta Commissioners presented a report and draft Act on Extra-Provincial Child Welfare, Guardianship and Adoption Orders as set out in Appendix E, page 150.

RESOLVED that the Alberta Commissioners' report and draft Act on Extra-Provincial Child Welfare, Guardianship and Adoption Orders be received and printed in the Proceedings and that the draft Act and commentaries be circulated and if the Act and commentaries are not disapproved by two or more jurisdictions on or before December 31, 1988 by notice to the Executive Secretary, the Act be adopted by the Conference as a Uniform Act and recommended for enactment

Note: No disapprovals were received

Financial Exploitation of Crime

The matter was referred back to the Nova Scotia Commissioners for a report in 1989.

French Version of the Consolidation of Uniform Acts

The New Brunswick Commissioners presented a report on the Permanent Editing Committee as set out in Appendix G, page 155.

RESOLVED that the Permanent Editing Committee be chaired by a delegate from New Brunswick for the year 1988-89

Human Tissue Act

The Alberta Commissioners presented a progress report on the Human Tissue Act.

RESOLVED

1. that the Alberta Commissioners continue to have charge of the project;

2. that in doing the project, the Alberta Commissioners consult as broadly as possible, preferably by having meetings with those jurisdictions that wish to participate, but the draft Act is not to be circulated freely to various interest groups; and

3 that the Uniform Law Section request the Executive to provide funding from the Research Fund in respect to this project

International Trusts Act

The Alberta Commissioners presented a report and draft amendment to the International Trusts Act as set out in Appendix H, page 156.

RESOLVED that the Alberta Commissioners' report and draft amendment to the International Trusts Act be received and printed in the Proceedings and that the amendment be adopted by the Conference as an amendment to the Uniform Act and recommended for enactment.

Law Reform Conference of Canada

The President of the Law Reform Conference of Canada presented a report on its Fourth Annual Meeting, as set out in Appendix I, page 157.

RESOLVED that the President's report on the Fourth Annual Meeting of the Law Reform Conference of Canada be received and printed in the Proceedings

Matrimonial Conflicts of Laws Act

The Quebec, Ontario and Nova Scotia Commissioners presented a report on Matrimonial Conflicts of Laws Act as set out in Appendix J, page 159.

RESOLVED

1 that the report from the Quebec, Ontario and Nova Scotia Commissioners on Matrimonial Conflicts of Law be received and printed in the Proceedings;

2 that the matter be referred back to them for consultation with the Federal-Provincial Committees on Family Law; and

3 that those Commissioners prepare a draft Act and commentaries to be referred to the Legislative Drafting Section for adoption in 1989

Mental Health

The French Version of the Mental Health Act was not available for the Proceedings last year. It is now set out in Appendix K, page 185.

Private International Law

The Federal Commissioners presented a report on the Department of Justice's Activities in Private International Law as set out in Appendix L, page 238. The Special Committee on Private International Law also presented its report. It is set out in the same Appendix.

RESOLVED that the Federal Commissioner's Report on the Department of Justice's Activities in Private International Law be received and printed in the Proceedings

RESOLVED that the Special Committee's report on Private International Law be received and printed in the Proceedings.

It was suggested that the Special Committee look at International Factoring and International Financial Leasing to see what would be the best approach.

Protection of Privacy: Tort

The Saskatchewan Commissioners presented a report on Protection of Privacy: Tort. The matter, including Breach of Confidence, was referred back to the Saskatchewan Commissioners for a further report in 1989.

Sale of Goods Act

The matter of amendments to the Sale of Goods Act was referred back to the Saskatchewan Commissioners for a report in 1989.

Steering Committee's Report

The Chairman presented the Steering Committee's Report as set out in Appendix N, page 251.

RESOLVED that the Steering Committee's Report be received and printed in the Proceedings.

Trade Secrets Act

The Alberta Commissioners presented a report on Trade Secrets.

RESOLVED that the revised draft Act and commentaries as set out in Appendix O, page 252 be circulated and if the commentaries are not disapproved by two or more jurisdictions on or before November 30, 1988, by notice to the Executive Secretary, the commentaries be adopted by the Conference as part of the Uniform Act

Note: The commentaries were not available at press time on November 30

Trusts – Conflict of Laws Relating To
Loi uniforme sur les règles de conflit de lois en matière de fiducie

Les commissioners du Nouveau-Brunswick ont présénte un rapport portant modification à la Loi uniforme sur les conflits de lois en matière de fiducie.

> **Il est resolu** que la Loi uniforme sur les conflits de lois en matière de fiducie soit modifié à l'alinéa 1 (1) a) par la suppression des mots «d'avoir pour le bénéfice d'un bénéficiaire ou pour une fin précise» et leur remplacement par les mots «d'un fiduciaire»

Nominating Committee's Report

Basil D. Stapleton, Q.C. was elected Chairman of the Uniform Law Section for the year 1988-89.

Close of Meeting

Special tributes were paid to the Chairman, Basil D. Stapleton, Q.C., for his outstanding contribution to the work of the Section.

There being no further business, the meeting was declared closed.

CRIMINAL LAW SECTION

MINUTES

Attendance

Forty-two (42) delegates attended the deliberations of the Criminal Law Section of the Uniform Law Conference for 1988 representing the ten provinces and the Federal Government. There were no representatives from either the Yukon or Northwest Territories present.

Opening

Mr. H. N. (Hal) Yacowar presided as chairman and Michael E. N. Zigayer acted as secretary for the meeting of the Criminal Law Section of the Uniform Law Conference, 1988. The delegates introduced themselves.

Report of the Chairman

The delegates met and gave careful consideration to forty-four resolutions and four discussion papers from Monday, August 8 through Thursday, August 11, inclusive. Twenty-four of the resolutions were carried; twelve were defeated and eight were withdrawn. A full day was devoted to the consideration of the discussion papers submitted by the Federal Government dealing with various issues including: Paramilitary Schools and Mayhem Manuals; Areas of consensus regarding Crown disclosure to Correctional Authorities; A possible legislated statement of the purpose and principles of sentencing; and, The implementation of three anti-terrorism treaties by Canada in early 1988.

The resolutions were wide ranging and included proposals to re-enact the offence of gross indecency, creating more hybrid offences, increasing certain penalties, proposing alternative ways to deal with constructive murder types of offences, eliminating the requirement for corroborating evidence in forgery cases, proposing an offence of theft of information, and, prohibiting possession of firearms by acquittees on account of insanity. As in the past, the discussion was marked by a free exchange of views.

Closing

Jean-François Dionne of Quebec was unanimously elected as Chairman of the Criminal Law Section for the 1989 conference to be held in Yellowknife, Northwest Territories. Michael Zigayer was unanimously confirmed as secretary.

RESOLUTIONS

I – ALBERTA

Item 1

That section 358(1)(d) of the *Criminal Code* be amended so that the provision would read:

> "to induce any person to entrust or advance anything to a company, or to enter into any security for the benefit of a company"

(CARRIED AS AMENDED: 34-0-0)

Item 2

That the problem of pre-trial publication of an accused's

1) criminal record
2) previous conduct and/or
3) character

with respect to its relationship to the offence of contempt of court be codified in the *Criminal Code.*

(CARRIED AS RE-DRAFTED: 23-3-4)

Item 3

(1) To add a new section to the *Criminal Code* giving the Court of Appeal power to order a new trial after the conviction for an included offence on the original charge.

(DEFEATED AS ORIGINALLY DRAFTED: 3-25-5 ON A DELEGATION VOTE)

(2) To add a new section to the *Criminal Code* similar to the sample section giving the Court of Appeal power to order a new trial after the conviction for an included offence on the original charge.

Section 613(2.1)

Where the appellant is convicted of a lesser offence than the offence charged, the Court of Appeal may order a new trial on the offence originally charged.

(DEFEATED AS AMENDED: 13-19-1 ON A DELEGATION VOTE)

Item 4

Amend section 643(1) of the *Criminal Code* by removing the duty to have a signature of a Judge on the transcript (of a preliminary inquiry) thereby making the provision consistent with section 468(5).

(CARRIED: 31-0-2)

II - BRITISH COLUMBIA

Item 1

That the *Criminal Code* be amended so that all indictable offences punishable by a maximum of ten years or less imprisonment may also be prosecuted summarily.

(CARRIED: 22-6-2)

Item 2

That section 241 of the *Criminal Code* be amended to change the time limit for request by the accused for his sample of blood to 60 days from the day set for first appearance on a related charge.

(CARRIED AS AMENDED: 14-6-8)

Item 3

That the *Criminal Code* be amended to allow for the joinder of summary conviction and indictable offences, with the indictable procedure to then apply.

(CARRIED: 26-1-4)

Item 4

That section 518 of the *Criminal Code* be repealed.

(WITHDRAWN)

V - NEW BRUNSWICK

Item 1

That section 246.6 be amended to strike a more appropriate balance between the accused's right to a fair trial and the right to make a full answer in defence and society's interest in preserving the privacy of complainants in sexual cases.

(WITHDRAWN)

Item 2

(1) That section 181(1) of the *Criminal Code* be amended to conform as closely as possible to section 443(1) of the *Criminal Code* so as to meet the minimum standard under section 8 of the *Charter* for authorizing search and seizure.

(WITHDRAWN)

(2) That section 181 of the *Criminal Code* be repealed and its provisions incorporated in section 443 of the *Criminal Code*, including the power of judicially ordered forfeiture of items seized.

(CARRIED: 29-0-0)

Item 3

Create a statutory mechanism to permit judicial prior authorization for the seizure of hair and blood from crime suspects.

(CARRIED AS AMENDED: 18-7-6)

Item 4

That section 518 of the *Criminal Code* be amended to provide that an indictment alleging murder may also contain counts of attempted murder where the charges arise out of the same set of circumstances.

(WITHDRAWN)

Item 5

That section 462 of the *Code* be repealed.

(CARRIED AS AMENDED: 30-0-0)

III - NEWFOUNDLAND AND LABRADOR

Item 1

(1) That the *Criminal Code* of Canada be amended to increase the maximum period of probation allowed.

(DEFEATED: 5-22-2)

(2) That the *Criminal Code* of Canada be amended to allow for a period of probation upon the release of an accused sentenced to more than two years imprisonment.

(DEFEATED: 11-16-6)

Item 2

That section 127(2) of the *Criminal Code* be amended to create a hybrid offence.

(WITHDRAWN)

Item 3

That section 127(2) of the *Criminal Code* be amended to indicate that whether the attempt to obstruct justice would or would not have succeeded is irrelevant.

(WITHDRAWN)

Item 4

That section 133 of the *Criminal Code* of Canada be amended to add a subsection making it a hybrid offence for a person who, having been required by law to attend or remain in attendance for the purpose of giving evidence, fails, without lawful excuse, to attend or remain accordingly.

(DEFEATED: 7-21-1)

IV - ONTARIO

Item 1

Amend section 137(1) to give the judge the power to impose a consecutive or concurrent sentence to any penalty already given.

(CARRIED AS AMENDED: 23-0-6)

Item 2

(1) That section 646 of the *Criminal Code* be amended to require a judge to enter into an inquiry into an offender's ability to pay a fine prior to determining both that a fine is the appropriate sentence to be imposed and, if so, the amount of the fine.

(CARRIED: 28-5-0)

(2) That subsection 646(10) of the *Criminal Code* be repealed and that a new section be substituted which would apply to all offenders who have defaulted in the payment of their fines. The new section would allow a judge to issue a warrant bringing such offenders before the court, at which time a judicial inquiry will

take place to determine why the offender has not paid his fine, whether an extension in time to pay is required, or whether a warrant in default of payment should be issued.

(DEFEATED: 7-17-8)

Item 3

That subsections 98(1) and (2) be amended to include persons who have been acquitted by reason of insanity.

(CARRIED: 22-2-9)

Item 4

That the *Criminal Code* be amended to provide that everyone who engages in vaginal, oral, or anal intercourse or masturbation in a public washroom, toilet or other similar facility to which the public has access is guilty of a criminal offence.

(CARRIED AS REDRAFTED: 18-5-8)

Item 5

Amend the *Criminal Code* to expressly criminalize the wrongful appropriation of intangible confidential information which has a commercial value.

(CARRIED: 19-0-12)

Item 6

That sections 4(2) and 4(3.1) of the *Canada Evidence Act* be amended to specifically permit evidence of spousal communications otherwise inadmissible by subsection 4(3).

(CARRIED AS AMENDED: 25-0-4)

Item 7

That section 243.4(1)(a) be made a hybrid offence.

(WITHDRAWN)

Item 8

Amend Form 29 to provide for breaches of recognizance in addition to that of non-attendance in court.

(CARRIED: 22-6-3)

Item 9

Include a provision similar to subsections 3(7) and (8) of the *Criminal Code* in the *Canada Evidence Act* to avoid requiring oral evidence of the service of documents.

(CARRIED AS AMENDED: 31-0-0)

Item 10

Amend subsection 133(9) to permit the admission of certificate evidence where an accused is released by a justice upon his undertaking or recognizance and the Crown alleges or fails to appear for fingerprinting.

(CARRIED: 27-0-3)

Item 11

Increase the penalty for the offence of failure to stop at the scene of an accident to five years.

(CARRIED: 17-10-2)

Item 12

(1) Where the commission of one of the listed offences (sections 52, 76, 76.1, 132, 133(1), 134, 135, 136, 246, 246.1, 246.2, 247, 247.1, 302, 306, 389, 390, 518) involves the intentional infliction of bodily harm, the administering of a stupefying or overpowering thing, the willful stopping of breath of a victim, or the use of a weapon; and death results that the minimum sentence be life imprisonment with a minimum parole eligibility period of 10 years.

(DEFEATED: 5-10-16)

(2) That section 518 of the *Criminal Code* be amended to permit joinder of indictable offences arising out of the same transaction in an indictment charging murder.

(CARRIED: 27-3-2)

(3) That section 518 of the *Criminal Code* be amended to permit joinder of indictable offences arising out of the same or a series of related transactions in an indictment charging murder.

(DEFEATED: 5-15-11)

VI - SASKATCHEWAN

Item 1

(1) It should be made clear that preliminary hearings may be held in the absence of the accused where he fails to appear on the date set for the preliminary inquiry.

(DEFEATED: 8-8-11)

(2) (a) Amend section 471.1 to replace the word "abscond" with "does not appear for the resumption of a preliminary inquiry which has been adjourned".

(b) Amend section 643(3) of the *Code* accordingly to refer specifically to evidence "taken in the absence of the accused".

(CARRIED: 19-6-3)

Item 2

That section 472 be amended to provide that the adjournment periods ordered under this section be served consecutively to any period of incarceration the witness is presently serving.

(DEFEATED: 3-17-7)

VII - QUEBEC

Item 1

Amend section 178.12 of the *Criminal Code* to permit the Attorney General of a province to obtain authorization for intercepting private communications in his province even if the crime concerned was committed outside it.

(CARRIED: 26-0-3)

Item 2

Amend the *Code* to permit the confiscation of all materials used in the commission of offences under section 185, 186, 187, 189, or, 190 of the *Code.*

(WITHDRAWN)

Item 3

(1) That the *Criminal Code* be amended to allow counsel for the parties to summon witnesses themselves, subject to certain exceptions to be defined, and that the list of witnesses who have been summonsed be filed with the Clerk of the Court.

(DEFEATED AS AMENDED: 6-15-6)

(2) That the *Criminal Code* be amended to allow counsel for the parties to summon witnesses themselves subject to certain exceptions to be defined.

(DEFEATED AS ORIGINALLY DRAFTED: 8-5-6)

Item 4

Amend the *Code* to prohibit, subject to acquired rights, any firearm designed, by its construction or modifications to permit it to fire in the full or semi-automatic mode.

(CARRIED: 22-2-5)

VIII - CANADA

Item 1

That the *Criminal Code* be amended to repeal subsection 325(2), thereby eliminating the statutory requirement of corroboration in respect of the offence of forgery.

(CARRIED: 29-0-0)

CLOSING PLENARY SESSION

MINUTES

Opening of Meeting

The meeting opened at 4:30 p.m. on Thursday, August 11 with Georgina Jackson in the chair and Mel Hoyt as Secretary.

Legislative Drafting Section

The Chairman, Merrilee Rasmussen, reported on the work of the Section. The minutes of the Section are set out at page 21.

Uniform Law Section

The Chairman, Basil Stapleton, reported on the work of the Section. The minutes of the Section are set out at page 28.

Criminal Law Section

The Chairman, Hal Yacowar, reported on the work of the Section. The minutes of the Section are set out at page 33.

Resolutions Committee's Report

The Chairman, Ken Hodges, presented the Resolutions Committee's Report.

RESOLVED that the Conference express its appreciation by way of letter from the Secretary to:

1. The Government of Ontario, for its generous hospitality in hosting the Seventieth Annual Meeting of the Uniform Law Conference of Canada and in particular:

   a) for the bus tour of downtown Toronto;

   b) for arranging for tickets for the American League Baseball game between the Toronto Blue Jays and the Kansas City Royals;

   c) for the visit to Ontario Place;

   d) for the visit to the Ontario Science Centre;

   e) for a most memorable Wednesday evening in a superb setting consisting of the ferry ride to Toronto Islands, the annual East-West Baseball Game and the picnic style B-B-Q;

f) for the trip to Niagara Falls; and

g) for the reception and banquet on Thursday evening.

2. Howard F. Morton, Q.C. Senior Crown Counsel/Criminal Law Policy, the Ontario Ministry of the Attorney General and Mr. Morton's wife, Aiko Morton, and also to Daniel and Chris Morton, for their outstanding contribution to the success of this Conference.

3. The Government of Ontario, for hosting the reception following the Opening Plenary Session and for providing the hospitality room throughout the week.

4. The Ontario Conference Committee made up of Howard Morton, Q.C., Donald Revell, James Breithaupt, Q.C., Michael Cochrane, Douglas Beecroft and James Irvine all of whom contributed to the Conference and made our visit to Toronto most enjoyable.

5. Michael P. Sullivan, the President of the National Conference of Commissioners on Uniform State Laws, for the hospitality extended to our Acting President at the recent meeting in Washington, D.C., and for contributing to the enhancement of relations between our conferences by honouring our Conference with the attendance of himself and his wife, Marilyn.

6. The Government of Canada for hosting the reception for the Legislative Drafting Section.

7. Hal Yacowar, Chairman of the Criminal Law Section, Basil Stapleton, Q.C., Chairman of the Uniform Law Section and Merrilee Rasmussen, Chairman of the Legislative Drafting Section.

8. Anne-Marie Trahan, Associate Deputy Minister, Federal Department of Justice, Andrew Roman, Private Practitioner in Toronto and Louise Ducharme, Avocate, Quebec, Fonds d'aide aux recours collectifs, Michel Paquette, Avocat at the Ministry of International Affairs of Quebec, for taking time from their regular duties to attend and assist the Uniform Law Seciton in its deliberations.

9. Pierrette Guenette, Francine Chretien, Robert Kehayes, Lise Maisonneuve, Jacques Rolland, Andre Moreau, Pauline Gluzgold, Lise Divergelio, Arnaud Dekvarent, Fabrice Cadieux, Ross Gillies, Rolf Fiesel and Mark Belisle, for the excel-

lent interpretation, translation and other administrative support services provided to the Conference by the Canadian Intergovernmental Conference Secretariat.

Review of the Financial Situation

The Treasurer, Peter Pagano, presented a Review of the Financial Situation of the Conference as set out in Appendix F, page 152.

RESOLVED

1. that the Treasurer's Review of the Financial Situation of the Conference be received and printed in the Proceedings;
2 that the budget proposals be received by the Conference; and
3. that the recommendations made in the Review be adopted

Research Fund

The Acting President, Georgina Jackson, presented a Report on the Terms of Reference of the Research Fund as set out in Appendix M, page 249.

RESOLVED that the Terms of Reference of the Research Fund be adopted and printed in the Proceedings

Review

The Acting President reported that the Executive Committee will be reviewing the articles which have been written about the Uniform Law Conference during the past few years.

Future Meetings

There was some discussion as to the most appropriate time to hold our meetings in Yellowknife next year.

RESOLVED that the Uniform Law Conference meet next year in Yellowknife from August 12 for the Legislative Drafting Section and continuing on to the 18th with the Opening Plenary Session being held at 8 p.m. on the 13th.

Nominating Committee's Report

The Honorary President reported on the membership of the Nominating Committee and the factors taken into account in their deliberations.

RESOLVED that the following officers of the Conference be elected for the year 1988-89

Honorary President	Graham D. Walker, Q C , Halifax
President	Georgina R Jackson, Regina
1st Vice-President	Basil D. Stapleton, Q.C , Fredericton
2nd Vice-President	Daniel C Prefontaine, c.r., Ottawa
Treasurer	Peter Pagano, Edmonton
Secretary	Howard F Morton, Q C , Toronto
Ex Officio	Merrilee Rasmussen, Regina
Ex Officio	Jean-François Dionne, Sainte-Foy

Close of Meeting

There being no further business, the President declared the meeting closed.

APPENDIX A

(See page 26)

AUDITORS' REPORT

To the Members of the
Uniform Law Conference of Canada:

We have examined the statement of receipts and disbursements and cash position of the Uniform Law Conference of Canada for the year ended June 30, 1988. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests and other procedures as we considered necessary in the circumstances.

In our opinion, this statement presents fairly the cash position of the organization as at June 30, 1988 and the cash transactions for the year then ended, in accordance with the basis of accounting described in Note 1 to the statement applied on a basis consistent with that of the preceding year.

Saint John, Canada
July 18, 1988.

Clarkson Gordon
Chartered Accountants

UNIFORM LAW CONFERENCE OF CANADA

Statement of Receipts and Disbursements and Cash Position
Year Ended June 30, 1988

	General Fund	Research Fund	Total 1988	Total 1987
Receipts:				
Annual contributions (note 2)	$66,000		$66,000	$46,000
Government of Canada		$ 1,946	1,946	5,123
Interest	4,049		4,049	3,875
	70,049	1,946	71,995	54,998
Disbursements:				
Printing	35,528		35,528	14,686
Executive Director honorarium	18,695		18,695	19,445
Secretarial services	2,688		2,688	3,168
National Conference of Commissioners on Uniform State Laws				2,466
Executive travel	4,805		4,805	3,723
Annual meeting	5,979		5,979	5,955
Professional fees	747		747	712
Postage	750		750	826
Stationery	125		125	386
Miscellaneous	5	15	20	15
Telephone	1,760		1,760	1,920
Human Tissue Project (note 3)		1,639	1,639	
Personal Property Security Project				250
Mental Health Project				1,684
	71,082	1,654	72,736	55,236
Excess (deficiency) of receipts over disbursements	(1,033)	292	(741)	(238)
Cash position, beginning of year	6,580	73,053	79,634	79,872
Cash position, end of year	$ 5,547	$73,345	$78,893	$79,634
Cash position consists of:				
Term deposits		$72,000	$72,000	$65,000
Current account	$ 5,547	1,345	6,893	14,634
	$ 5,547	$73,345	$78,893	$79,634

(See accompanying notes)

UNIFORM LAW CONFERENCE OF CANADA

Notes to the Statement of Receipts and Disbursements and Cash Position June 30, 1988

1. *Accounting policies*

   The accompanying statement of receipts and disbursements and cash position reflects only the cash transactions of the organization during the year.

   This statement is prepared on a fund basis. The Research Fund includes the receipts and disbursements for specific projects. The General Fund includes the receipts and disbursements for all other activities of the organization.

2. *Annual contributions*

   These financial statements do not reflect assessments in arrears in the amount of $3,000 related to Yukon ($1,000) and Newfoundland ($2,000).

3. *Human Tissue Project*

   Pursuant to a letter dated June 21, 1988, the organization has been notified that expenditures on the Human Tissue Project will not be reimbursed by the Department of Justice.

4. *Tax status*

   The Conference qualifies as a non-profit organization and is exempt from income taxes.

APPENDIX B

(See page 28)

CLASS ACTIONS:
A PATH TO REFORM

DISCUSSION PAPER

by

Michael G. Cochrane*

*Michael G. Cochrane is Counsel in the Policy Development Division of the Ministry of the Attorney General for Ontario. The views expressed in this discussion paper are his own and not the views of the Ministry of the Attorney General or the Government of Ontario.

The paper is for discussion purposes at the Uniform Law Conference of Canada, 1988.

Introduction

In 1983, the Quebec Superior Court rejected a request by Roger Lasalle, an Archambault prisoner at the time of its infamous riot, to launch a class action suit against the prison authorities.

In January of 1988, the Quebec Court of Appeal overruled that decision and permitted an $18 million class action suit to be filed on behalf of 425 people who were prisoners at Archambault Penitentiary during the riot in 1982.

The suit is based on allegations of mistreatment by prison guards in the week following the riot in which five people died.

In the United States, ten thousand victims of the Dalkon shield wished to institute proceedings against its manufacturer, The Robins Company Ltd. The company, not the plaintiffs, wished to have the action certified as a class action. The trial judge certified the claims as a valid class action against the wishes of the plaintiffs' lawyers.

The plaintiffs and their lawyers opposed certification as a class action after it was learned that one plaintiff in a separate individual proceeding, received a judgment for six million dollars against the company. Given the prevalence of contingency fees, neither the plaintiffs nor their lawyers wanted the claims certified as a class action.

On appeal, the certification was overruled and the class action dissolved. It has been reported that the Robins Company has since paid

out $750 million to victims, approximately $500 million of which went to legal fees and disbursements.

The need for class action reform has been a matter of debate in Canada and abroad for over a decade. On the one hand we have an evergrowing body of opinion that reform is desperately needed and that the case for reform has clearly been made. On the other hand, opponents of class action reform argue that increased availability of class actions will open the floodgates of litigation, legitimize legal blackmail and further destabilize the insurance marketplace.

This discussion paper, which was prepared by Ontario for the Uniform Law Conference (1988) is designed to generate discussion about what shape the reform should take.

While the discussion paper is long it is not exhaustive. Its focus is very much on developments in Ontario. Comments and suggestions with respect to the content of this paper would be warmly received.

A. *SUMMARY OF ISSUES*

A class action is an action brought on behalf of, or for the benefit of numerous persons having the same interest. It is intended to provide an efficient means to achieve redress for widespread harm or injury by allowing one or more persons to bring the action on behalf of many.

Although Ontario's Rules of Civil Procedure (Rule 12) already contemplate plaintiffs and defendants being involved in class actions, weaknesses in the rule and restrictive court interpretation have effectively barred class actions in Ontario. The rule has not been substantially altered since 1881 and, given its limited wording, the courts have thrown up both substantive and procedural obstacles to class actions.

And yet, as some observers have noted, litigation in the '80s and '90s is more likely to be with respect to mass injuries - mass products liability (asbestos, thalidomide, D.E.S., Dalkon IUD), mass environmental injury (chemical spills as in Bhopal or nuclear spills) or mass injury through negligence (airplane crashes, Kansas City skywalk collapse). No one wishes such mass injuries to occur but they are, for modern industrialized societies, inevitable.

Class actions can be the effective method of litigating such mass claims. They can economize judicial and court resources and can permit individuals to seek redress for claims too small or too complex and risky to justify individual law suits.

The case for reform hinges on three general propositions: (i) that in appropriate cases, class actions could lead to more efficient judicial handling of complex cases; (ii) that they could provide improved access to the courts for people whose claims might not otherwise be asserted; and, finally, (iii) that an effective class action procedure might deter, for example, companies from wrongful or illegal behaviour.

Two linked approaches are necessary to accomplish this needed reform:

(i) legal obstacles to class actions must be modified so that such actions are possible; and

(ii) controls must be provided to protect the interests of those who would be the subject of such suits and to protect class members.

This latter concern arises from the fact that a class action is brought by an individual plaintiff on behalf of a group of absent class members who are not themselves present before the court and who lack any real ability to determine the course of litigation which may affect their individual rights.

There are two alternative ways of accomplishing these goals:

(i) amend the existing rule governing class actions to cure its deficiencies;

(ii) provide a new comprehensive class action remedy by statute.

(3) *Collateral Issues*

Assuming reform of the area is undertaken, several collateral issues arise:

(i) Whether class actions should require approval from the courts before they proceed (certification), and if so, what factors should be considered at certification?

(ii) Whether class members should be able to opt out of the action, or required to opt in;

(iii) How and when class members should be notified about the action and its progress;

(iv) Whether there should be a special role for the Attorney General in any class action;

(v) Whether there should be special provision with respect to costs at the conclusion of a class action.

B. *AN OVERVIEW OF SOME POTENTIAL ECONOMIC IMPACTS*

The Ontario Law Reform Commission Report on Class Actions reviewed the possible economic impact of a new class action remedy under four headings as follows:

(i) Impact of Class Actions Upon the Courts;

(ii) Bankruptcy of Defendants;

(iii) Insurance Premiums;

(iv) The Effect Upon Consumers and Shareholders.

(i) *Impact of Class Actions Upon the Courts:*

Class actions can expose the judiciary to an increased workload. However, the often heard criticism that class actions will result in a "flood" or "explosion" in litigation is not supported by statistics in either the United States or Quebec. In fact, the statistics have been quite the contrary.

U.S. Experience:

The United States has had class action remedies by virtue of U.S. Federal Court Rule 23 since 1966. A study of the fiscal years 1973 to 1978 indicated that class actions on average accounted for only 2.1% of all civil actions in U.S. Federal courts. By 1981-82, the figure had dropped to .9% of all civil actions, and by 1983 to .4%. Recent statistics (January of 1986) show a continued but slowing decline in class actions filed and pending in the United States Federal courts. Much of this decline was in new civil rights class action filings. While Ontario's experience may be less prolific than that of the United States, there is one unknown variable - the Charter of Rights and Freedoms. Section 24 contemplates "anyone whose rights or freedoms have been infringed may apply to the court for any remedy the court considers appropriate and just." To date such remedies have included an award of damages.

It is probable that class actions will be commenced against government in the context of section 24 of the Charter. The extent to which recourse will be had to the section is difficult to forecast.

Quebec Experience:

Quebec has had class action legislation since January 19th, 1979. Between January of 1979 and June of 1983, only 101 class actions had been filed of which only 25 were certified as class actions. Of the 25 certified, 16 proceeded to trial of which only 8 had been decided (4 by default or consent) as of 1983. In that small group of eight cases, plaintiffs were successful in 7 - defendants in 1). With respect to the balance of the claims filed, there have been high levels of abandonment, delay and dismissal.

(ii) *Bankruptcy of Defendant:*

The Ontario Law Reform Commission examined the suggestion that class actions, which assert large aggregate claims for damages, expose defendants to the possibility of "a financial death sentence". The filing of a class action, it is also said, may impede financial planning, impugn a corporation's credit status, impose prohibitive costs on small business and, in some cases, cause bankruptcy.

The Commission commented that it was difficult to evaluate the potential bankruptcy criticism because of a lack of empirical and even anecdotal evidence. The Commission observed that small businesses would not be prime targets for class action suits, as their limited resources would be a disincentive for the representative plaintiff.

The Ontario Law Reform Commission also observed that, even if class actions do threaten serious economic consequences to businesses that play a useful role in the community, this risk can be met without denying an expanded class action procedure. Instead, the presiding judge should be given the power to stay the execution of the judgment, or to order payment by installments in appropriate circumstances. This feature would not be unlike the power now given to a judge in section 9 of the *Family Law Act, 1986*, whereby he or she may defer the payment of a judgment over a ten-year period.

(iii) *Insurance Premiums:*

Given the current insurance climate, this will be an area of particular concern. The research done by the Ontario Law Reform Commission has been overtaken by the insurance industry's experience betweeen the fall of 1985 and 1988.

During the recent reported insurance crisis, industry representatives attempted to draw comparisons between the U.S. experience and Ontario experience as a justification for increased premiums, (the "Cali-

fornia North" syndrome). Opponents of the industry's position were quick to point out that Ontario is, in actual fact, quite different from the United States and, among other differences, pointed to the absence of meaningful class action litigation in our jurisdiction.

Dr. Slater noted in his Report on Insurance, which was tabled in the Ontario Legislature May 6, 1986, that Ontario has not suffered many of the problems the United States has experienced in the liability insurance area. He discusses a number of the differences and notes in particular that "class actions that allow the aggregation of individual loss and play a significant role in American tort litigation are not available in Ontario."

The Ontario Law Reform Commission observed that insurance companies would, in all likelihood, need to acquire experience in assessing risks to newly exposed businesses. This, they commented, may result in inappropriately high insurance premiums that would later stabilize. If the choice is between the availability of a class action procedure and increased premiums, the Ontario Law Reform Commission recommends the acceptance of increased premiums. The Commission considered increased premiums that accurately reflected the additional risks to which particular businesses may be exposed to be the price that had to be paid. Increased premiums will provide market discipline, allow for compensation of innocent victims and, in some cases reward safety conscious firms by lowering premiums and giving them a competitive edge.

(iv) *Effect Upon Consumers and Shareholders:*

This criticism of class actions concerns the impact upon two separate groups. In one sense, any damages that a defendant in a class action must pay would inevitably be passed on to the shareholders of the defendant company by way of an equity reduction or to consumers of the defendant's product by way of a price increase. Observers have noted that this passing on of external costs merely indicates to consumers and shareholders the true economic costs generated by the activity of the defendant. If they do not approve of the cost being passed on, they should make informed decisions about consumption of the product or investment in the company. There are no persuasive arguments to suggest that a class action remedy should not be available simply because consumer prices may rise to absorb the expense and the shareholders, who may have profited from the corporation's activities, will suffer a reduction in their equity.

Conclusions with Respect to the Economic Impact of Class Actions

In conclusion, the economic impact of class actions is characterized by a lack of statistical or empirical information. In many cases, the choice is between what some may consider to be an undesirable expense and the class action remedy itself. The Ontario Law Reform Commission was not persuaded that any expense that may arise would justify the denial of the remedy.

The most sensitive issue is the possible impact of a class action remedy upon insurance premiums. The industry has shown during the recent crisis that it will not hesitate to dramatically increase premiums. Removed from the current context the question of increased insurance premiums is actually no different thatn the other possible economic consequences.

C. *CLASS ACTION BACKGROUND ISSUES AND OPTIONS*

(1) *Background and Issues*

A class action is an action brought on behalf of, or for the benefit of numerous persons having the same interest. It is intended to provide an efficient means to achieve redress for widespread harm or injury to allowing one or more persons to bring the action on behalf of many.

The class action which has been a part of our common law since the 18th Century, was originally a procedural device employed by the Court of Chancery to avoid a multiplicity of actions and injustice encountered in the inflexible common law courts. It became a part of Ontario's Rules of Civil Procedure when the common law courts and courts of equity merged in Ontario in 1881. The rule's language remained virtually unchanged from 1881 until the recent amendments of the Rules of Civil Procedure, and even then was not substantially altered.

Rule 12 of the Ontario Rules of Civil Procedure states as follows:

> "Where there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so."

Class actions are suited to incidents of mass injury whether through single incidents (airplane crashes), injury to persons in a geographic area; (environmental injury through chemical spill) or defective consumer goods (Firenza, thalidomide, D.E.S. Dalkon IUD).

The types of problems which have required the remedy provided by Rule 12 have been varied but relatively infrequent. The following is a list of some issues encountered to date in Ontario and Canada that were, or would have been, considered appropriate for class action. (Those marked with * indicate a class action was instituted.)

(a) urea formaldehyde foam insulation;

(b) trust company frauds (Greymac, Astra Trust);

(c) defective automobiles (*General Motors of Canada Ltd. v. Naken* (1983), 32 CPC 138 (S.C.C.));*

(d) train derailments (Mississauga);

(e) misleading advertising (*Cobbold v. Time Canada Ltd.* (1976), 13 O.R. (2d) 567 (H.C.)).*

In Ontario, during the review of the Rules of Civil Procedure, the Williston Committee commented:

> "We are convinced that the present procedures concerning class actions is (sic) in a very serious state of disarray."

This sense of concern and disarray is underlined when one examines the treatment class actions have received in Ontario. The courts, labouring within the limits of the rule, have thrown up both substantive and procedural hurdles to class actions.

Substantive Obstacles to Class Actions under Rule 12

To meet the substantive requirements of the existing rule the plaintiffs must establish two critical elements:

(i) *numerosity* – that is that there are numerous persons in the class that have a claim; and

(ii) *same interest* – that is that each of the numerous persons in the class has a common interest, common grievance and will share in a common success; an action cannot proceed if:

  (a) members of the proposed class have separate contracts with the defendant, or

  (b) damages for individual members will have to be assessed separately.

Each of these questions will be examined separately.

(i) *Numerosity*

This requirement for numerous persons or numerosity has not been the subject of a great deal of comment in Ontario. It is clear that there is no minimum number for a class action, except that there must be more than one person in the class. In addition, there is no maximum number of individuals that may be included in a class. There is, however, an Alberta decision that says four is not enough to constitute a class. In Ontario, the *Naken* decision had a class consisting of approximately 4,600 individuals. The *Sugden v. Metro Toronto Police Commissioners Board* (1978), 190 R. (2d) 669 (H.C.) decision had a class of approximately 4,000 to 5,000 individuals, and *Cobbold v. Time Canada Ltd.* had a class of approximately 180,000 individuals.

The conclusion which may be drawn, with respect to the numerosity requirement, is that the numbers question has not been a problem for Ontario class actions. It appears that more than one is required, but that the sky is the limit for the size of the class under the present rules.

(ii) *Same Interest*

The most widely accepted definition of this element of a class action was set out in the *Duke of Bedford v. Ellis (U.K.)* decision reported in 1901. It stated as follows:

> "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all the plaintiff proposed to represent."

This definition has been frequently cited in both Ontario and the rest of Canada. However, at least one case has spoken in terms of, not so much a need for commonness in the class itself, but rather, commonness in the result of the action. Each member of the class must benefit in some measure from successful prosecution of the case. In Ontario, the most recent and signficant cases, *Naken* and *Cobbold* both speak in terms of "common success".

It is this element and the meaning given to it that has generated much of the controversy surrounding class actions. The requirement for "same interest" has been the basis of the denials of class actions in cases of "separate contracts" (see (a)) and "damages" (see (b)).

However, aside from these two issues, the meaning of the expression "same interest" itself has created difficulties. The three part test, established in the *Duke of Bedford* case, is not particularly helpful in determining whether the subject matter of the claim should proceed as a class

action. There has never been full agreement on the meaning that should be attributed to the parts of the definition. Other decisions have spoken of the need for "common purpose", "common origin" or "common interest". Ontario decisions, on the other hand, have spoken of "same interest" as being necessary, not as a part of the relationship among members of the class, but rather as an interest in the *result* of the action.

The courts have also struggled with the meaning of "same interest" because the elements of the *Duke of Bedford* definition often overlap.

The net effect of this confusion over the expression "same interest" has been a judicial refusal to consider actions as class actions. In addition the "same interest" requirement has resulted in two major restrictions being imposed by the courts: class actions cannot be brought where (a) class members have separate contracts with the defendant or (b) where the class seeks damages.

(a) *Separate Contracts*

In examining the need for "same interest" the courts have erected an apparent prohibition against class actions where the claims of the individual class members are based upon separate contracts. In several decisions the courts of the United Kingdom and Ontario have said that the separate contracts of many plaintiffs are not collectively enforceable against a defendant in a class action. While there have been attempts to distinguish these decisions, by and large the existence of separate contracts has been fatal to constituting a class action.

(b) *Damages*

Again, in examining the need for "same interest" the courts have erected an apparent prohibition against class actions where the relief sought is damages. Until very recently this interpretation occurred almost without exception. The court considered an entitlement to damages to be personal to the individual. Each individual would need to prove separately his or her entitlement to damages. Representation therefore becomes impossible. Individual assessments of damages are considered inconsistent with the concept of a representative action.

An exception has arisen in Ontario and, in limited circumstances, damages may be claimed in a class action. If full liability of a defendant could be determined without resort to further individual proceedings, through the use of common proof of all claims, then the class action could proceed to trial. Similarly if the amount claimed on behalf of each class member is identical or readily ascertainable by, for example, mathematical calculation then the claim could proceed.

However any variance in the amounts claimed, methods of calculation or the need for individual assessments would be a total bar to a class action.

This apparent prohibition is not only difficult to understand, it is contradictory to the fact that a class action claiming equitable relief such as an accounting, (rather than damages) which necessitated additional subsequent proceedings with respect to individual entitlement, would be acceptable.

Procedural Obstacles to Class Actions under Rule 12

Procedurally, Rule 12 is so brief that the court was often required to supply a great deal of the procedure necessary to enable any semblance of a hearing for the class action. A glance at the rule (Schedule 2) reveals no guidance on a number of critical procedural elements. For example, is court approval of the class required? Should notice be given to other members of the class? How should the action be conducted? Can all members of the class be discovered? Should costs be disposed of on a traditional two-party litigation basis?

The void left by Rule 12 is illustrated by the most infamous case decided under it – *Naken v. General Motors of Canada Limited.*

The *Naken* class action was brought by four individual plaintiffs on behalf of a class of some 4,600 purchasers of a model of automobile produced and marketed by the defendant. One thousand dollars was claimed on behalf of each member of the class representing the alleged depreciation in resale value of each vehicle attendant upon defects in production. Liability was said to be founded on the defendant's breach of expressed warranties of fitness contained in advertising. The case reached the Supreme Court of Canada after the Ontario Court of Appeal had allowed it to proceed only on behalf of a class limited to those purchasers who had actually seen and relied upon the defendant's advertisements. The Supreme Court, speaking unanimously through Estey, J., foresaw the proposed action as proceeding in at least three stages:

1. A High Court trial to determine whether any, or all, members of the class had a valid cause of action against the defendant.
2. Reference to the Master of the Supreme Court to establish reliance on the part of each individual claimant, and the extent of their damages up to a limit of $1,000.
3. Final proceedings before a trial for computation and entry of judgment.

The court decided that judicial creation of such proceedings would have been entirely incompatible with the brevity of Rule 75. (now Rule 12)

In conclusion the procedural value of Rule 12 has been described quite accurately as "skeletal". Its inadequacy is apparent in several key aspects when one considers that a class action could have tens of thousands of plaintiffs.

Conclusions on Substantive and Procedural Obstacles to Class Actions Under Rule 12.

The following general conclusions may be drawn about the approach taken by the courts to Rule 12 and class actions in general:

(a) the need for numerous persons has not been an obstacle to class actions although it has not been the subject of much judicial consideration;

(b) the need for "same interest" has been an insurmountable obstacle especially in cases involving separate contracts and claims for damages that might involve individual assessments;

(c) procedural provisions are non-existent or totally inadequate.

For those who are obliged to use the rule whether plaintiff, defendant or judge, its inadequacy for treatment of mass wrongs is apparent.

Response of the Ontario Law Reform Commission

The matter of class actions was referred to the Ontario Law Reform Commission in 1976. Its mandate was to review class actions and propose a revised class action procedure, as well as study the impact of class actions on the judicial system. The three-volume report was completed in 1982, and from a scholarly point of view, has been hailed by all as an important contribution to learning and scholarship in this area. However, praise for its recommendations has not been as universal. Various interest groups, including the Canadian Manufacturers' Association, the Canadian Bar Association, the Canadian Institute of Chartered Accountants, the Public Interest Research Centre and McMillan, Binch (a Toronto law firm), among others, emerged during the months following the release of the Ontario Law Reform Commission's Report to praise scorn its contents.

The Ontario Law Reform Commission's Report is the most sophisticated analysis yet undertaken in North America of the class action issue. The report presents a powerful case for reform. It demonstrates that

most of the criticisms and fears that have been expressed about class actions, in the past, can be shown to be unfounded by the empirical evidence of those jurisdictions that have had class action reform.

The Commission hinges the case for reform on three general propositions: (i) that in appropriate cases, class actions could lead to more efficient judicial handling of complex cases; (ii) that they could provide improved access to the courts for people whose claims might not otherwise be asserted; and, finally, (iii) that an effective class action procedure might deter, for example, companies from wrongful or illegal behaviour. The Commission was anxious to give the courts sufficient powers to filter out cases that would be inappropriate for class action treatment, and to deter any abuses. At the same time, the Commission believed that to be effective, class action reform would require special procedural devices, and a special set of rules for costs.

The bulk of the Commission's 900-page report is devoted to devising technical procedural rules that would ensure the smooth passage of class actions through our court system. Most of the recommendations are not particularly controversial. However, those that are controversial have been singled out for separate treatment in this discussion.

It should be stressed that the Commission examined the current law very closely and found it to be defective. It also examined the procedural alternatives to class actions, and found them wanting. It felt that the number of cases in Ontario that would be appropriate for class treatment, would not be large. After its six-year review, it concluded that no compelling arguments could be mounted against a sweeping reform of Ontario's class action rule, and the enactment of comprehensive class action legislation.

Some of the issues which were examined by the Ontario Law Reform Commission Report and which are still debated are as follows:

(i) Is there a genuine need for a class action remedy?

(ii) What impact would increased access to an expanded class action remedy have on insurance premiums or the business community?

(iii) Will an expanded class action remedy open the "floodgates" to litigation?

(iv) Does such a remedy challenge principles of fundamental justice through the publication of private law, disruption of the normal adversarial process, judicial impartiality or *res judicata*?

(v) Will such a remedy reduce multiplicity of actions, increase access to justice, and deter illegal or unconscionable behaviour?

(vi) What form should the remedy take if implemented – Rule 12 modification or a new comprehensive bill?

(vii) Should there be a threshold scrutiny of class actions through certification?

(viii) Should members of the class be required to opt in or opt out of the action, or should the court be given discretion to decide case by case?

(ix) What should the Attorney General's role be in class actions?

(x) Do we need to implement special rules for costs in class actions?

The above issues and others will be addressed during consideration of the following options:

(2) *Class Action Options*

(i) Amend the existing rule governing class actions to cure its deficiencies

(ii) Provide a new comprehensive class action remedy by statute

Assuming class action reform is undertaken five collateral issues require consideration. These issues concern the way in which the class action would proceed and will be examined under the following general heading:

(3) *Collateral Issues:*

(i) Whether class actions require approval from the courts before they proceed (certification), and if so, what factors should be considered at certification?

(ii) Whether class members should be able to opt out of the action, or required to opt in;

(iii) Whether, and how, class members should be notified about the action and its progress;

(iv) Whether there should be a special role for the Attorney General in any class action;

(v) Whether there should be a special provision with respect to costs at the conclusion of a class action.

4. *Discussion of Options*

The Case for Reform

Maintaining the status quo is not a serious option since everyone agrees the status quo is unsatisfactory. Even the major corporate groups which have opposed the Ontario Law Reform Commission's recommendations have stated that reform of the current system is desirable.

As discussed above, from a substantive point of view, the interpretation of Rule 75 (now Rule 12) has virtually foreclosed the law developing through judicial intervention. The apparent prohibitions against a class action where the plaintiffs have separate contracts or claim damages have resulted in few, if any, class actions.

Procedurally the existing law is even less satisfactory. Both plaintiffs and defendants are concerned about the Rule's lack of procedural guidance. Although defendants are no doubt pleased that the Rule has prevented class actions, in the event one is started "successfully", the existing rule offers no check in class representatives, no easy way of discouraging improper actions and no guidance on such questions as costs.

As some observers have noted, litigation in the '80s and '90s is more likely to be with respect to mass injuries - mass products liability (asbestos, thalidomide, D.E.S., Dalkon IUD), mass environmental injury (chemical spills as in Bhophal, nuclear spills) or mass injury through negligence (airplane crashes, Kansas City skywalk collapse). No one wishes such mass injuries to occur but they are, for modern industrialized societies, inevitable.

OPTION 1 - AMEND THE EXISTING RULE GOVERNING CLASS ACTIONS TO CURE ITS DEFICIENCIES

This option, which would be a middle course, would acknowledge some of the deficiencies in the current Rule 12 but would address them not through a new separate statute but rather through the expansion of Rule 12 itself with further rules and subrules. Rule 12 would require subrules dealing with certification, notice, opting in/out, costs and even appeals among other issues.

(iv) Whether there should be a special role for the Attorney General in any class action;

(v) Whether there should be a special provision with respect to costs at the conclusion of a class action.

(I) Whether class actions should require approval from the courts before they proceed (certification), and if so, what factors should be considered at certification?

Background

In both the United States and Quebec, legislators have recognized that to ensure proper control over class actions, some sort of threshold scrutiny of the case is necessary. They have done this by a procedural device known as certification. During a certification hearing, which occurs very early in the legal action, a court can look at the particular case and the representative plaintiff and determine whether both meet certain standards to allow them to proceed. It is basically a screening device to ensure that none of the absent class members, the courts, the defendants nor the public is going to be prejudiced for example, by an action proceeding which would be impossible to try. These actions can be turned back at an early stage before litigants have expended large amounts of time, money and effort on prosecuting or defending a case.

Two separate issues arise within the larger question of certification:

(i) Should class action reform include an initial court screening mechanism; and

(ii) What factors should be considered in screening class action?

ISSUE (i)

Should class action reform include an initial court screening mechanism?

Pros

A certification procedure would provide important benefits to class action procedure. It would, for example, act as a prophylactic for potential abuse of the remedy. Use of a class action as a tool of blackmail is a legitimate concern in the absence of a screening mechanism. A defendant would need to seriously consider the settlement of large, potentially prolonged, but unsubstantiated claims. Certification would minimize such an occurence early in the proceedings.

The Act would provide a comprehensive procedure for a class action and would need to address significant issues such as certification, opting-in/opting-out, notice requirements, the role of the Attorney General and costs.

Pros

Only signficant legislative change can overcome the substantive obstacles that have arisen and are preventing meaningful class actions.

Class actions may bind absent class members without any control over the proceedings. This alone would justify inposing some statutory safeguards to protect against inadequate self-appointed representatives.

Class actions are so inherently complex that they justify special standards in relation to the courts, the public and defendants. The precise nature and reach of these safeguards constitutes one of the most pressing issues in this submission.

Given the significance of the issue the Legislature should establish the guidelines by statute rather than permit an unelected Rules Committee to amend the Rules.

Cons

The remedy may not be used enough to justify a separate statute.

The Rules of Civil Procedure could be expanded to increase access to the remedy somewhat while retaining the same restrictive substantive tests.

ISSUE TO CONSIDER:

Assuming class action reform is undertaken, should it be done by changes to the Rules of Court or through significant legislative change?

OPTION 3 - COLLATERAL ISSUES

Regardless of the course of reform - rule change or statute - a number of collateral issues arise. These issues will be examined under the following headings.

(i) Whether class actions should require approval from the courts before they proceed (certification), and if so, what factors should be considered at certification?

(ii) Whether class members should be able to opt out of the action, or required to opt in;

(iii) How and when class members should be notified about the action and its progress;

If a litigant has a right that he or she believes has been violated or infringed, he or she is able to seek redress through the courts without facing special obstacles that are unrelated to the merits of the case. Why should the situation be any different simply because an action is brought in class form rather than by an individual litigant on behalf of himself or herself? Legislation should not restrict access to justice.

ISSUE TO CONSIDER:

SHOULD CLASS ACTIONS BE SUBJECT TO APPROVAL FROM THE COURTS BEFORE THEY PROCEED (CERTIFICATION)?

ISSUE (ii)

What factors should be considered in screening class actions?

Background

If certification is to be meaningful it would be necessary to prescribe factors which should be considered by the court upon such an application. This would add consistency and predictability to the device. Under the present Rule 12 only two requirements must be satisfied in order to be able to institute a class action: a numerosity requirement and a same interest requirement.

In its report, the Commission recommended that a court should certify a class action only after considering (a) the preliminary merits of the claim; (b) the size of the class; (c) the issues it has in common; (d) the adequacy of representation provided by the named plaintiff; and (e) the desirability of proceeding by way of class action in the particular case, including (f) an analysis of the costs and benefits to the members of the class, to the court and to the public.

The following is an overview of the certification test recommended by the Ontario Law Reform Commission:

a) Preliminary Merits of the Claim

Pursuant to this factor the court would attempt to determine whether or not an action has been brought in good faith, and whether or not there is a reasonable possibility that material issues of fact and law common to the class will be resolved at trial in favour of the class.

In Ontario all civil actions are already subject to various safeguards contained in the Rules of Civil Procedure. For example, Rule 25.11 permits a defendant to move to strike out at an early stage all or part of a

pleading that is scandalous, frivolous or vexatious. Rule 56.01 may be used to obtain security for costs and Rule 57.01 permits a judge to consider the merits of the action as a factor when considering the question of costs at the end of the proceeding.

On the other hand, while safeguards exist within the Rules of Civil Procedure, the onus is on the defendant to establish the inadequacy of the plaintiff's action. Motions to dismiss are rarely successful because the plaintiff's pleadings are presumed to be true. Security for costs will only be ordered if the defendant can establish the inadequacy of the plaintiff's assets in the jurisdiction as well as the action's frivolous or vexatious nature. While costs may be ordered to the successful defendant it is only at the conclusion of the action when they may be astronomical and uncollectable.

A preliminary merits test, therefore, would be a prudent feature at the certification stage.

b) Numerosity

Pursuant to this factor the court would determine that there are numerous persons in the class. The numerosity question would continue to be open-ended.

c) Common Questions

Pursuant to this factor the court would determine whether the action raises questions of fact or law common to the class.

d) Adequacy of Representation

The Ontario Law Reform Commission recommended that representation of the class be scrutinized on two fronts – the representative plaintiff and the representative plaintiff's legal representation. As the Commission's Report comments, a distinguishing characteristic of a class action is that it determines the interests of individuals in their absence. Consequently some protection of their interests is necessary.

This factor would permit the court to ensure that the plaintiff is in fact a member of the class and therefore has a personal interest in the suit. It would also permit the court to inquire as to whether the representative plaintiff has any interest adverse to that of the class members and the financial means (if necessary) to conduct the law suit. (The OLRC considered the latter inquiry to be irrelevant if its recommendations on costs were accepted.)

Of a far more sensitive and controversial nature is the ability to enquire into the adequacy of legal representation of the class. This

would be essentially an examination of the lawyer's capabilities to conduct a class action. While the calibre of the counsel is critical, it is difficult to determine exactly how such an assessment would be made. The experience in the United States has been that while the courts are reluctant to examine critically the class lawyers' qualifications, they are prepared to act as a watchdog.

The OLRC has recommended scrutinizing class action counsel on the basis that absent members of the class must be protected. Presumably this could be accomplished through the earlier enquiry with respect to the adequacy of the representative plaintiff. If the plaintiff is acceptable and has selected a particular counsel the power to reject his or her selection is questionable.

The Commission's analysis in this respect leaves many unanswered questions. For example, what happens when counsel is rejected as unqualified? Will counsel, senior or otherwise, risk such a challenge? Would such a determination effectively foreclose a lawyer's career in the class action field? Enough questions remain unanswered to raise serious doubts about the need of the court to scrutinize counsel's qualifications. In addition, the members of the class would always have civil recourse against the lawyer and counsel is subject to cost provisions such as Rule 57.07. (This rule provides that where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or default, the court may make an order disallowing costs, directing the solicitor to reimburse the client or require the solicitor to pay the costs personally.)

e) Superiority

The court must find that the class action offers a superior method to any other available for the fair and efficient resolution of the controversy. In considering this, the court might look at factors such as whether the common questions raised predominate over the questions that affect only individual members; whether a significant number of class members have a valid interest in "going it alone" by prosecuting individual actions; whether any of the claims raised are already before the courts; whether this is a more practicable or efficient way of resolving the claims; and whether a class action would be more difficult to administer than another sort of action.

f) Cost Benefit Assessment

This last recommendation was the Commission's major innovation in the area of certification, and has been severely criticized. The Commission reasoned that since class actions may impose burdens on the

court system and on defendants out of all proportion to the monetary value or abstract importance of the case, the court should be able to prevent such an action from proceeding. The Commission felt that factors like these might frequently weigh on judges considering certification decisions, and that this process of assessing the costs and benefits of the action should be carried out openly, rather than as an unarticulated component of some other enquiry. Judges should have to specifically consider the impact on the courts and the public. In this way the court would have an additional perspective on whether it was appropriate for a class action to proceed.

The Commission's recommendation has raised adverse comments from virtually every brief and comment. The question is whether it is feasible or desirable for the court to be given power to reject an otherwise acceptable claim, which has met all the other threshold tests of the certification hearing, on the basis of vague and open-ended criteria, which are at their root highly subjective.

Is the judge in a position to make a valid assessment of such imponderables as the abstract impact of a particular case on the court system, or the importance of a case to the public interest? How would counsel for the parties address these issues in argument? Would expert analyses by economists or management analysts be required? Critics have argued that it is both unrealistic and improper for the judge to embark on this type of enquiry. It would provide an unassailable pretext for denial of virtually every class action, even those which otherwise met all the certification criteria. The vagueness of the test, the lack of experience of the Canadian judiciary and bar with undertaking cost-benefit analyses, and the fact that no other jurisdiction has ever required this sort of inquiry, all tend to argue against this element of the certification test.

ISSUE TO CONSIDER:

SHOULD THE CERTIFICATION TEST CONTAIN THE FOLLOWING ELEMENTS:

(a) PRELIMINARY MERITS

(b) NUMEROSITY

(c) COMMON QUESTIONS

(d) ADEQUACY OF REPRESENTATION BY PLAINTIFF

(e) SUPERIORITY

(f) A REVIEW OF THE COMPETENCE OF THE CLASS LEGAL REPRESENTATION

(g) AN EXPLICIT REQUIREMENT FOR A COST-BENEFIT ANALYSIS

(II) Whether class members should be able to opt out of the action, or required to opt in.

Background

The key feature of a class action is that it is brought by an individual plaintiff on behalf of a group of absent class members who are not themselves present before the court, and who lack any real ability to determine the course of litigation which may affect their individual rights. Thus, many of the central features in class action reform are designed to protect the interests of absent class members, and to ensure that they are not unwittingly prejudiced by actions taken in their name.

A central issue for decision is whether class members should be able to exclude themselves from an action in which they do not wish to participate. An even more restrictive and arguably more protective approach would be to require potential class members to positively elect to be a member of the class. These alternatives are generally referred to as whether a class action law should permit opting-out, or require opting-in.

If a right to opt-out or a duty to opt-in is created, then class memers must have some knowledge of the action on which to base their decision. This is generally done through some form of notice. However, American experience suggests that sending detailed notice by mail to every potentially affected member of a class in a large class action can be an administrative nightmare, fearsomely expensive, and often a crushing burden on those required to undertake the notice.

Under the current law in Canada, class members have no general right to exclude themselves from the effect of a judgment. There is also no requirement that they opt-in. Nor is there any provision made in the current rule for class members to receive any notice concerning an action which may affect their rights, and which may prevent them from taking any subsequent legal action, because of the doctrine of *res judicata*. (Once a matter is decided on its merits that decision is conclusive of the rights of the parties and may not be retried again in a later trial.)

Nevertheless, it would be troubling if an individual could be prejudicially affected by an action in which he had not directly paticipated, and from which he desired to be excluded. The key question, then, becomes

how this process of individual participation can be most efficiently managed.

OPTION 1

Require all class members to opt-in to an action.

OPTION 2

Permit class members to exclude themselves from the action by opting-out.

OPTION 3

Give the court a discretion to determine whether opting-out should be permitted in particular cases.

OPTION 1 - REQUIRE OPTING-IN

On its face, this appears to be the option most consistent with freedom of choice. It can be argued that instituting an opt-in regime serves to remove from class actions those members who have no personal interest in the action. Additional arguments are made that requiring opt-in solidifies the class at an early stage, providing defendants with firm lists of names, thereby making it easier for them to determine accurately their total potential liability, as well as making it easier to engage in settlement negotiations.

The Ontario Law Reform Commission in rejecting arguments in favour of opting-in felt that the consequences of such a provision would be to preclude class actions in virtually every case. The Commission was not convinced that the failure to opt-in reflected a deliberate, informed decision by the silent class members. The Commission felt, on the contrary, that there were significant social and psychological barriers discouraging people from seeking redress through the courts, that would also inhibit them from participating openly in a class action. It is these barriers that a class action seeks to overcome. Promoting access to the courts for individuals who have similar claims which are not themselves sufficiently substantial to merit the very considerable expense of an individual civil action, is one of the major purposes and rationales of class actions.

OPTION 2 - PERMIT INDIVIDUALS TO OPT-OUT

Individual class members would have the right to withdraw from the action.

The strongest argument in favour of an opt-out provision is the fundamental principle that everyone must be free not to be plaintiff in a civil suit if that is his or her desire, unless there are compelling reasons for the contrary.

Also a class member should be able to opt-out in order to pursue his or her own remedy in the event he or she thinks they have an increased likelihood of success acting alone as opposed to within a possibly weak class action.

The Ontario Law Reform Commission, in considering this option, felt that there would be some cases in which the extension of a right to opt-out would be only a gratuitous gesture. They referred to cases where the individual amounts in dispute were so relatively small that no member would have any economic incentive to pursue an action separate from the other members of the class.

Moreover, there would be actions which would affect individuals, whether or not they excluded themselves. For example, individuals may be seriously affected by injunctive or declaratory relief. The court order may result in action being prescribed or the rights of large numbers of individuals being clarified. In the United States, there is no right to opt-out of a class action seeking injunctive or declaratory relief.

In suits for damages, even if class members are not permitted to opt-out, there would be no need for any class member to be compelled to pursue his or her individual share of the recovery. After the trial and after assessment of damages, a class member would be quite free to elect to take no action to recover. Thus, it is not necessary to provide an opportunity for exclusion at an early stage in the proceedings for those who ultimately wished not to press their claims against a defendant.

OPTION 3 - GIVE THE COURT DISCRETION TO PERMIT OPT-OUT ON A CASE-BY-CASE BASIS

The recommendation endorsed by the Ontario Law Reform Commission is to reject the opt-in option and to adopt a modified opt-out. The trial judge would be given a discretion to determine whether or not opting-out would be permitted in a particular case. The judge would do this in the light of a number of factors, including whether the judgment would practically affect class members even if they excluded themselves; the amount of the individual claims involved, and whether they are sufficiently large as to justify independent litigation; whether it is likely that a significant number of class members would wish to exclude

themselves; and whether the cost and inconvenience of any notice that would be required to inform members of their right to opt-out would outweigh the individual interest in withdrawal from the suit. The final factor would be "the desirability of achieving judicial economy, consistent decisions, and a broad-binding effect of the judgment on the questions common to the class".

The Commission took this position because it believes that no other option can recognize the diversity of cases that may be brought as class actions, and because it fears that the expense of mandatory notice would effectively chill the vast majority of class actions.

This option would also permit the court and litigants to gain experience with class actions. If that experience dictates a change it could then be accommodated.

ISSUE TO CONSIDER:

SHOULD THE COURT BE GIVEN THE DISCRETION TO PERMIT OPTING OUT ON A CASE-BY-CASE BASIS?

III How and when should class members be notified about the action and its progress?

Background

The means by which potential class members learn about the class action, and the means by which class members stay apprised of the action's progress raise questions with respect to the timing, form and content of any notice to class members.

Notice is important in three contexts (i) Post-Certification Notice (ii) Post-Judgment Notice and (iii) General Notice.

Under current Ontario law a self appointed class representative is now under no duty to inform class members of the existence of a class action. This constitutes a major deficiency in Rule 12 because the binding effect of the judgment will affect all members of the class even though unnotified. Notice therfore ensures that the interests of class members are adequately protected and represented.

Also notice permits the class members to learn of their right to opt-out (where the court in its discretion has permitted such an option).

Finally, notice informs class members of steps that they will have to take following judgment in favour of the class on the common questions in order to obtain their individual recoveries.

Notice warrants special attention because the experience of the United States has been that giving notice in a class action can be an expensive and laborious undertaking if the class is large. Questions have arisen with respect to who should get notice, who should be responsible for sending it and who should bear the cost.

Discussion

The Ontario Law Reform Commission's recommendations with respect to notice were very broad. They are not controversial and are consistent with the best practice of American courts. It was of the the view that cases vary and that maximum leeway should be given to the court to provide for notice on a case by case basis.

With respect to post-certification notice the Commission recommended that the court have the discretion, in all types of class action, to order that post-certification notice be given to members of the class informing them of the class action and that the court control the form and content of notice given.

In determining whether to order such notice the Commission recommended that the following factors be considered:

(a) The cost of giving notice;

(b) The nature of the relief sought;

(c) Whether the court has found that some class members may exclude themselves;

(d) The size of members' claims, and

(e) The total amount of monetary relief at stake.

With respect to post-judgment notice the Commission recommended that where the court gives judgment for the class on questions common to the class, and further proceedings are necessary that require the participation of class members, the court should be required to order that notice of the judgment be given to those members.

In all other cases the court should require post judgment notice by mail to identifiable class members by whatever means are reasonable and in a prescribed form.

With respect to general notice the Commission recommended giving the court a discretion, at any time in the action, to order such notice as it considers necessary to protect the interests of class members and other parties. However it did not recommend that such notice be used to

recruit members of the class to include themselves or to require opting-in prior to determination of questions common to the class. Again the form and content would be subject to court approval.

With respect to form and content of the various notices they could be by advertisement, publication, posting, distribution or individual notice. The court would be encouraged to use the least expensive method of notice.

In conclusion, the recommendations are not controversial and provide maximum flexibility with respect to notice through a class action.

ISSUE TO CONSIDER:

(i) SHOULD THE COURT BE ABLE TO ORDER THAT POST-CERTIFICATION NOTICE BE GIVEN TO MEMBERS OF THE CLASS INFORMING THEM OF THE CLASS ACTION; THAT THE COURT HAVE A NUMBER OF DIFFERENT WAYS OF REQUIRING THAT THIS NOTICE BE GIVEN; AND THAT IN CONSIDERING WHETHER TO ORDER NOTICE THE COURT CONSIDER THE FOLLOWING FACTORS:

(a) THE COST OF GIVING NOTICE;

(b) THE NATURE OF THE RELIEF SOUGHT;

(c) WHETHER THE COURT HAS FOUND THAT SOME CLASS MEMBERS MAY EXCLUDE THEMSELVES;

(d) THE SIZE OF MEMBERS' CLAIM, AND

(e) THE TOTAL AMOUNT OF MONETARY RELIEF AT STAKE.

(ii) SHOULD THE COURT BE REQUIRED TO ORDER NOTICE OF THE JUDGMENT BE GIVEN TO CLASS MEMBERS WHOSE PARTICIPATION IS NECESSARY IN PROCEEDINGS SUBSEQUENT TO THE DETERMINATION OF QUESTIONS COMMON TO THE CLASS. IN ALL OTHER CASES THE COURT SHOULD REQUIRE POST-JUDGMENT NOTICE BE SENT BY MAIL TO IDENTIFIABLE CLASS MEMBERS BY WHATEVER MEANS ARE REASONABLE AND IN A PRESCRIBED FORM UNLESS ORDERED OTHERWISE.

(iii) SHOULD THE COURT BE GIVEN THE DISCRETION, AT ANY TIME IN THE ACTION, TO ORDER SUCH NOTICE AS IT CONSIDERS NECESSARY TO PROTECT THE INTERESTS OF THE PARTIES OR CLASS MEMBERS' INTERESTS.

HOWEVER SUCH NOTICE SHOULD NOT BE USED TO RECRUIT CLASS MEMBERS OR REQUIRE OPTING-IN PRIOR TO THE DETERMINATION OF QUESTIONS COMMON TO THE CLASS.

(iv) SHOULD THE FORM AND CONTENT OF ANY SUCH NOTICE BE SUBJECT TO COURT APPROVAL?

IV. Whether there should be a special role for the Attorney General in any class action.

Background

Currently, the Attorney General is only given notice of an action in which he is not directly a party, where the constitutional validity or applicability of a statute or regulation is in question. Thus there is no requirement that the Attorney General be notified of an action simply because it is brought in class form.

Current Ontario law makes no special provision for the Attorney General's role in litigation conducted in class form. The Attorney General is guardian of the public interest, and in this role he may in some cases be regarded as conducting civil litigation on behalf of the community at large: public nuisance actions are a good example. Nevertheless, actions brought by the Attorney General as guardian of the public interest are quite different from class actions, since individual members of the public who are affected have no right to participate in the action, to exclude themselves, or to share in any monetary recovery which is automatically paid into the consolidated revenue fund.

Further, the Attorney General has no special right to intervene in any class action. He has the general right to apply to the court for permission to intervene. It will be granted if the case raises questions of public interest upon which the Attorney General's views would be of interest.

It is virtually unheard of for the Attorney General to be denied permission to intervene should counsel request it.

Two options emerge with respect to the Attorney General's role.

OPTION 1

The Attorney General should be given notice of every class action at its commencement; the Attorney General should have the right to intervene at any stage of the action concerning any aspect of the action that raises a matter of public interest, if the public

interest requires it; and if the representative plaintiff either consents or is incapable of protecting the interests of absent class members, the Attorney General should be able to take over the carriage of the action as the representative plaintiff.

Option 1 sets forth in general terms the recommendations of the Ontario Law Reform Commission. The Commission recommended against providing for public initiation of class actions, but went on to remark "that the public interest could best be protected by permitting the Attorney General to apply to the court to intervene in a class action at any stage of the proceedings".

The Commission also felt that to provide adequate representation for absentee class interests, it should be open to the court to make an order substituting one representative plaintiff for another, and the Commission further recommended that the Attorney General should be capable of taking over a class action from a representative plaintiff.

The Commission makes these arguments because a class action is a hybrid creature in the legal world. While it is civil litigation between private parties, nevertheless it is also litigation of a very substantial kind, which may impact upon public law enforcement, and which may significantly affect the public interest.

However, the Commission's recommendations have been criticized by the Canadian Bar Association Committee, and by other commentators, on the basis that this is an unnecessary infringement upon the right of a representative plaintiff to conduct civil litigation within the rules, on whatever basis the individual sees fit; that the sort of mass incidents which give rise to class actions will frequently involve the government in some form or another, and thus the Attorney General might have a multiplicity of interests in the action; and that it is virtually inconceivable that the government would be denied the right to intervene in an appropriate case where it sought permission through the Attorney General or his counsel.

OPTION 2

That the Attorney General should be given notice of each class action, and should have a right to apply to the court for leave to intervene, on the same basis as in any other civil action but not take over the action.

This option provides avenues for the Attorney General's participation in a particular class action, but would subject this to the exercise of the discretion of the trial judge. This is the option preferred by most of the

briefs and commentators who have specifically considered the issue. No other class action legislation appears to pay particular attention to the role of the Attorney General.

This option is the most consistent with the individual party's freedom of action, while providing a mechanism for representations to be made on matters which directly affect the public interest.

ISSUE TO CONSIDER:

SHOULD THE ATTORNEY GENERAL BE GIVEN NOTICE OF EACH CLASS ACTION, AND HAVE A RIGHT TO APPLY TO THE COURT FOR LEAVE TO INTERVENE, ON THE SAME BASIS AS IN ANY OTHER CIVIL ACTION, BUT NOT TAKE OVER THE ACTION?

(v) Whether there should be special provisions with respect to costs in a class action.

Background

The Ontario Law Reform Commission was unanimous in concluding that the existing rules with respect to costs in litigation in Ontario could not apply to class actions and that the question of costs was the single most important issue considered by the Commission in its review. Changes in the area of costs, the Commission said, will determine whether a new procedure will be utilized. "Costs" refers to the total of lawyers' fees and disbursements incurred in litigation. Two categories of costs exist in Ontario and both are of interest to class action reform. (i) The first category of costs concerns those costs payable by an unsuccessful party to the successful party. (ii) The second category concerns costs payable by a client to his or her own lawyer. Both categories will be examined with a view to illustrating their shortcomings in the context of a class action.

(i) The costs the successful party pays to the successful party.

The general rules with respect to such costs are contained in section 141 of the Courts of Justice Act and Rule 57 of the Rules of Civil Procedure. Generally the court has a wide discretion to determine who shall pay costs and to what extent. However in Ontario "costs follow the event" and the "loser" almost always pays costs to the "winner". In the absence of misconduct by the "winner" or his/her lawyer the successful party is not denied his/her costs from the loser nor ordered to pay costs to the loser. This rule is designed to compensate the sucessful party for

being obliged to prosecute or defend. It is considered to encourage caution and deter unnecessary or speculative litigation.

Occasionally the general rule is not followed if the unsuccessful party has raised an important issue in his or her losing cause.

Ontario has no special provision for costs in class actions and given the potential size of such lawsuits such costs could be onerous if not crushing in the event of a loss. The representative plaintiff could be personally liable for payment of the successful party's costs as well as payment of his or her own lawyer.

Also there is no incentive or requirement for class members to contribute to the payment of costs in prosecuting the action.

(ii) The costs payable by a client to his or her own lawyer.

Even if a party is successful in the action and receives costs from the unsuccessful party this will rarely indemnify the successful party. He or she will still be required to pay his or her own lawyer the difference over and above that which was recovered from the "loser".

Similarly, the "loser" must not only pay the "winner" he or she must pay his or her own lawyer. The Solicitors Act governs the payment of fees and disbursements by a client to his or her lawyer. It controls the types of contractual arrangements that may be entered into. For example contingency fee arrangements are prohibited. This precludes a lawyer from taking a case for a percentage fee only charged in the event of recovery. While such fee arrangements are also prohibited by the Rules of Professional Conduct for Ontario lawyers the Law Society of Upper Canada is expected to release a report favouring contingency fees in the near future.

These restrictions deter plaintiffs from coming forward to be representative plaintiffs. There is widespread agreement that the operation of the existing costs rules in both categories discourage class actions generally.

Consequently these rules must be changed if class action reform is to be meaningful. There are three options:

OPTION 1

Introduce contingent fees to enable lawyers to underwrite class action litigation.

OPTION 2

(i) a no-way rule whereby the ordinary costs rule would be abrogated and replaced by a general rule that no costs be awarded to either party against the other; and

(ii) a modified contingency fee arrangement which is supervised by the court whereby a representative plaintiff and a class lawyer would be able to enter into an agreement linking an entitlement to fees to success in the action. However the amount of the fee could not be stipulated in the agreement. It would be fixed by the court at the time of settlement of judgment; and

(iii) cost sharing among successful class members wherby any fees and disbursements owing to the class lawyer pursuant to the above agreement would be deducted from the class recovery.

OPTION 3

Provide a fund for public financing of class actions.

OPTION 1 - INTRODUCE CONTINGENT FEES TO ENABLE LAWYERS TO UNDERWRITE CLASS LITIGATION

Background

The term "contingent fee" refers to a variety of arrangements whereby a lawyer agrees to undertake an action on the understanding that he or she will be paid only if the action succeeds, and that he or she will receive an agreed percentage of an award of damages. This option would move Ontario closer to the American system. Under this system, absence of success means there is no cost to the representative plaintiff for his or her own lawyer. If the class action suit, however, is a success, the lawyer's fees will be a percentage of the judgment.

Contingent fees are a very controversial subject for the Ontario Bar. There has been a fear that the lawyer's independent judgment would be distorted by the incentives of the contingent fee. This method of retainer is prohibited in Ontario by section 30 of the *Solicitors Act* and Rule 10 of the Rules of Professional Conduct. In a 1980 report, the Professional Organizations Committee recommended that there be no relaxation of the current prohibition of contingent fees as a payment mechanism for legal services in Ontario. Contingent fees are, however, permitted in all

other provinces of Canada, under specific statutes, rules, case law, or as a matter of practice. The Ontario Law Reform Commission reviewed the availability of contingent fee arrangements in other provinces and found that the provisions have rarely been used and seldom, if at all, abused.

Controversy over contingent fees will no doubt continue. In his final Report on Insurance Dr. Slater observed that Ontario is not "California North" because the Canadian tort system is different from the American system in several important respects. He observed, by way of example, as follows:

> "The contingent fee system in use in the United States, which arguably leads to both more speculative actions being brought and to the inflation of awards by juries that are sensitive to the net value of awards to plaintiffs, is not widely utilized anywhere in Canada and is prohibited in Ontario."

(The Law Society of Upper Canada is expected to publish its Report on contingency fees before the end of 1988.)

Pro

If Ontario can introduce class actions using special safeguards to prevent the alleged excesses of American law, it should also be able to provide sufficient safeguards for contingent fees.

Con

Every time the introduction of contingent fees has been suggested in Ontario, it has been resoundingly rejected by the practising bar. This rejection rests upon fears that contingent fees would encourage lawyers to engage in such misconduct as fomenting litigation, sharp litigation practices and unduly soliciting clients. Perhaps most seriously it could create a conflict of interest between lawyer and client whenever a settlement is proposed.

This conflict of interest is exacerbated by the fact that the interests of the plaintiff class are articulated only through the representative plaintiff. The class representative does not have the same economic stake that a plaintiff in an individual action does. He or she instructs counsel on behalf of many plaintiffs and compromising a class action affects the whole class.

There are also dangers in making the lawyer an entrepreneur within litigation such that all other alternatives must be explored first. Even the most comprehensive safeguards will not serve to allay the fears of both

the bar and of major groupings of potential defendants. There is a strong perception (both within and outside of the profession) that contingent fees and professional misconduct are linked.

Contingent fees alone do not address the problem of unsuccessful representative plaintiffs being responsible for costs of the successful party if they lose the class action.

OPTION 2 - ADOPT THE ONTARIO LAW REFORM COMMISSION RECOMMENDATIONS ON COSTS AND FEE RULES WHICH INCLUDED:

(i) no-way cost rule whereby the ordinary costs rule would be abrogated and replaced by a general rule that no costs be awarded to either party against the other; and

(ii) modified contingent fee arrangement which is supervised by the court whereby a representative plaintiff and a class lawyer would be able to enter into an agreement linking an entitlement to fees to success in the action. However, the amount of the fee could not be stipulated in the agreement. It would be fixed by the court at the time of settlement or judgment; and

(iii) cost sharing among successful class members whereby any fees and disbursements owing to the class lawyer pursuant to the above agreement would be deducted from the class recovery.

Background

The Commission recommended each side would be responsible for its own costs regardless of outcome. This is known as a "no-way cost rule".

The Commission states that it was guided by two major principles in making its costs recommendations:

(i) there should be no special cost disincentives simply because the action is a class action, rather than an individual action;

(ii) any changes made should strive as much as is possible to keep an equal hand between both parties, and be fair to all concerned.

It further stated that different costs rules should apply at the certification and common questions stages (the "group part" of the class action) than at any later proceedings to settle individual questions.

The no-way costs rules proposed by the Commission means that at the certification and common questions stage, the court will not generally make any costs awards at all. Each side is responsible for its own costs. This rule applies evenly to both sides – each is freed from the risk of paying the other's costs if they lose, and each pays its own costs.

The modified contingency fee proposal offers counsel the opportunity to undertake speculative litigation but at the same time gives the court final control of the fee charged if successful.

Deducting the class lawyer's fees and disbursements from the class recovery serves to spread responsibility for the expense of the litigation among all members of the class.

Pro

The Commission believes alternatives to their recommendations would be such an intolerable burden to class representatives as to completely discourage even obviously meritorious actions. The function that normal costs rules have of discouraging improperly brought actions is performed by the threshold tests at the certification stage and there is no need to duplicate this function. The Commission recommends a residual discretion for the judge to use a costs award to police vexatious or frivolous conduct.

The Ontario Law Reform Commission fees that the class lawyer may be an appropriate person to shoulder the risks. Under the Commission's proposals, the class lawyer may agree that he or she will not be paid if the action fails. The Commission tries to steer clear of the most cogent arguments against contingent fees by carefully controlling fee arrangements and by ensuring that the fee reflects the amount and quality of work done, not the amount of recovery earned. If an action succeeds, the lawyer will recover an extra amount to take account of the risks incurred. Any individual proceedings that follow litigation of common questions will be governed by the general costs rules that apply in any civil action.

The proposals represent a carefully drafted set of new principles designed to encourage meritorious actions while preserving a general even hand between the two parties.

Con

The Commission's costs proposals received significant support only from two academic commentators. They represent an unprecedented break with Ontario's legal experience, propelling us onto uncharted waters. There is no indication that they would be particularly effective in stimulating "the right sort" of class action.

The proposals are complex and cumbersome to administer. The court-administered fee arrangement still has elements of a contingent fee surrounding it and would be open to much the same criticism of giving the lawyer an undue stake in the success of the action. Courts may find it difficult to undertake any meaningful assessment of risk. The no-way costs rule removes most of the jeopardy attendant on the representative bringing an action, and in actual operation could be unfair to defendants. The safeguards built in may well be insufficient to prevent abuse in borderline frivolous cases.

OPTION 3 - PROVIDE A FUND FOR PUBLIC FINANCING OF CLASS ACTIONS

Background

Public funding of class actions can theoretically take place now in Ontario, if all the class members meet the eligibility requirements for legal aid; nevertheless, the Ontario Legal Aid Plan has had no extensive experience in providing such funding. In substantial measure this is because classes of litigants composed solely of persons eligible for legal aid are rare. In Manitoba, the legal aid authorities have established a special public interest litigation group within the provincial legal aid scheme - one part of such a group's mandate would be to participate in class actions. Quebec remains the only jurisdiction in the world where a special government fund exists for the sole purpose of providing financial assistance to class litigants.

As part of the Quebec class action reforms of 1978, a fund of $100,000 was established to fund class action litigation. The fund is a corporation within the meaning of the Quebec Civil Code and its object is to ensure the financing of class actions. It is administered by three people and is now entirely financed by the Quebec government. The fund works as follows:

> The representative plaintiff applies in writing for assistance from the fund. As a part of the application, the representative plaintiff sets out the basis of the claim, the essential

facts relied upon and a description of the group he or she purports to represent. The applicant must state his or her financial position and that of members of the group that the representative plaintiff is aware of. The representative plaintiff must also disclose the purpose for which the assistance is intended, the amount required and any other money or service that may be needed by the representative plaintiff. As a part of each application, the applicant must provide a detailed description of the amount of funds required. Pursuant to the Quebec system, the fund will study the application and hear submissions from the applicant and his or her counsel.

Pro

Quebec took the decision to provide public funding for two major reasons. Firstly, because it recognized that class actions are designed to provide access to justice for ordinary citizens who might otherwise find themselves unable to pursue their legal remedies. Secondly, because after examining the alternatives, the Quebec authorities believed that the other options would radically alter the status and professional relationships of the Bar. The provision of public funding provided incentives to overcome the obstacles and inertia of the impecunious class, and would do so without opening a debate on contingent fees.

The Quebec experience shows that such a fund can be set up quite inexpensively, that it is not difficult to administer and that the spectre of government interference in private litigation has not materialized. The establishment of a similar fund in Ontario would recognize the quasi-public nature of class litigation, and would involve no greater departures of principle than does the current provisions of civil legal aid to the qualified, or the funding provided for example to L.E.A.F. for Charter challenges.

Con

The Quebec fund has not been particularly successful in promoting greater use of class actions. Though the amounts expended have been small, this is largely due to the dearth of class action litigation in Quebec.

Moreover, it is troubling to have the resources of the state made available to one side, but not the other, in a civil dispute not because of the public importance of the issues raised, but simply because of the way

the action is framed. If there is a public interest component in one of these actions, it is better articulated by having the Attorney General intervene.

The Ontario Law Reform Commission rejected this option because they felt class actions should depend on private initiative, and because they were opposed to the creation of a new bureaucracy to administer the public funds. While the Commission came to this conclusion, they appear to not have considered the relatively inexpensive nature of the fund in Quebec. The report simply contains a blanket statement that a considerable expense would likely be involved.

4. ISSUE TO CONSIDER:

SHOULD A FUND BE CREATED TO PUBLICLY FINANCE CLASS ACTIONS?

Conclusion:

CONSIDER THE FOLLOWING POSSIBLE SOLUTIONS:

1. A NEW COMPREHENSIVE CLASS ACTION REMEDY BE PROVIDED BY STATUTE.
2. CLASS ACTIONS BE SUBJECT TO CERTIFICATION.
3. THE CERTIFICATION TEST CONTAIN THE FOLLOWING ELEMENTS:
   (a) PRELIMINARY MERITS;
   (b) NUMEROSITY;
   (c) COMMON QUESTIONS;
   (d) ADEQUACY OF REPRESENTATION BY THE PLAINTIFF, AND
   (e) SUPERIORITY.

   AND THAT THE CERTIFICATION TEST *NOT* INCLUDE A REVIEW OF THE COMPETENCE OF THE CLASS LEGAL REPRESENTATION OR AN EXPLICIT REQUIREMENT FOR A COST-BENEFIT ANALYSIS.
4. THE COURT BE GIVEN THE DISCRETION TO PERMIT OPTING OUT OF THE CLASS ACTION ON A CASE-BY-CASE BASIS.

5. (i) THE COURT SHOULD BE ABLE TO ORDER THAT POST-CERTIFICATION NOTICE BE GIVEN TO MEMBERS OF THE CLASS ACTION; THAT THE COURT SHOULD HAVE A NUMBER OF DIFFERENT WAYS OF GIVING THIS NOTICE; AND, THAT IN CONSIDERING WHETHER TO ORDER NOTICE, THE COURT SHOULD CONSIDER THE FOLLOWING FACTORS:

   (a) THE COST OF GIVING NOTICE;

   (b) THE NATURE OF THE RELIEF SOUGHT;

   (c) WHETHER THE COURT HAS FOUND THAT SOME CLASS MEMBERS MAY EXCLUDE THEMSELVES;

   (d) THE SIZE OF MEMBERS' CLAIMS, AND

   (e) THE TOTAL AMOUNT OF MONETARY RELIEF AT STAKE.

   (ii) THE COURT SHOULD BE REQUIRED TO ORDER NOTICE OF THE JUDGMENT BE GIVEN TO CLASS MEMBERS WHOSE PARTICIPATION IS NECESSARY IN PROCEEDINGS SUBSEQUENT TO THE DETERMINATION OF QUESTIONS COMMON TO THE CLASS. IN ALL OTHER CASES THE COURT SHOULD REQUIRE POST-JUDGMENT NOTICE BE SENT BY MAIL TO IDENTIFIABLE CLASS MEMBERS BY WHATEVER MEANS ARE REASONABLE AND IN A PRESCRIBED FORM.

   (iii) THE COURT SHOULD BE GIVEN THE DISCRETION, AT ANY TIME IN THE ACTION, TO ORDER SUCH NOTICE AS IT CONSIDERS NECESSARY TO PROTECT THE INTERESTS OF THE PARTIES OR CLASS MEMBERS' INTERESTS. HOWEVER SUCH NOTICE SHOULD NOT BE USED TO RECRUIT CLASS MEMBERS OR REQUIRE OPTING-IN PRIOR TO THE DETERMINATION OF QUESTIONS COMMON TO THE CLASS.

   (iv) THE FORM AND CONTENT OF ANY SUCH NOTICE BE SUBJECT TO COURT APPROVAL.

6. THE ATTORNEY GENERAL SHOULD BE GIVEN NOTICE OF EACH CLASS ACTION, AND SHOULD HAVE A RIGHT TO APPLY TO THE COURT FOR LEAVE TO INTERVENE, ON THE SAME BASIS AS IN ANY OTHER CIVIL ACTION BUT NOT TAKE OVER THE ACTION.

7. CLASS ACTIONS BE PUBLICLY FUNDED.

SCHEDULE 1

OUTLINE OF A POSSIBLE CLASS ACTION PROCESS

1. A class action would be a proceeding commenced by statement of claim by one or more persons who would commence the action on behalf of members of the class.

2. The representative plaintiff would immediately give notice to the Attorney General of the commencement of the class action.

3. Within a fixed period of time, to run from the filing of a Notice of Intent to Defend by the defendant, the representative plaintiff would be required to apply for certification of the class action.

4. Upon the application for certification, the court would look to the following factors:

   (i) preliminary merits of the action;

   (ii) the question of numerosity;

   (iii) common questions;

   (iv) adequacy of representation of the plaintiff;

   (v) superiority.

5. The application for certification would be based on affidavit material subject to the parties' rights to examine the deponents.

6. If the class action is certified, the certification order would describe the class on whose behalf the action is brought, describe the nature of the claim made on behalf of the members of the class and specify the relief claimed, define the questions of fact or law common to the class, and state whether some or all members of the class will be permitted to exclude themselves from the class action, and specify a date before which some members may exclude themselves.

7. A list of criteria for making the determination with respect to opting-out would be prescribed by the legislation and would include such factors as whether the claims of the members of the class are so substantial as to justify independent litigation, whether there is a likelihood that a significant number of members of the class would desire to exclude themselves, the cost of notice necessary to inform the members of the class of the class action and the right to exclude themselves, and the desirability of achieving judicial economy, consistent decisions and a broad binding effect of the judgment on the questions common to the class.

8. After certification of the action, the court would determine the need for, and method of, notice to be given to members of the class. In making this determination, it would have regard to the cost of giving notice, the nature of the relief sought, the size of the claims of the members of the class and the total amount of monetary relief claimed in the action, among other criteria.

9. The Act would prescribe the contents of a notice to be given to members of the class.

10. If certification was denied, a court would amend the title of proceedings and eliminate any reference to representation of members of a class and permit the action to proceed accordingly.

11. The court would reserve the right to de-certify a class action if the conditions set out above were no longer satisfied.

12. Existing rules of discovery would apply as between the representative plaintiff and the defendants. The defendant would have the right to apply to the court to discover other members of the class and the court would be given detailed criteria to assist them in making the determination, as to whether or not such discoveries should be permitted.

13. Questions common to the class would be determined in common proceedings, and questions that require the participation of individual members of the class would be determined in individual proceedings. Separate judgments could be given in the common proceedings and the individual proceedings.

14. As the Attorney General would be given notice of each class action he or she would have the right to apply to the court for leave to intervene on the same basis as any other civil action.

15. The court would be given broad powers for the purpose of ensuring the fair and expeditious determination of the issues placed before it, including the making of orders that would prevent repetition or complication of the action, and be permitted to impose any terms or conditions it considered proper.

16. Where the court had determined the common questions in favour of the class and subsequent proceedings were necessary to determine individual questions, the court would be empowered to conduct alone or with other judges of the court or to appoint one or more persons to conduct such proceedings by way of enquiry and report, and to give directions with respect to the conduct of these proceedings.

17. The court would be given broad powers to determine the aggregate amount of the defendant's liability and give judgment accordingly, including the means by which the judgment would be distributed to members of the class and the manner in which class members would establish their claim to a portion of the judgment.

18. The judgment given by the court on the questions common to the class would name or describe the members of the class who are bound by the judgment, describe the nature of the claim made on behalf of the members of the class and specify the relief awarded, and define the questions of fact or law common to the class.

19. The court would be given the power to direct that any amount awarded would be paid either in lump sum forthwith or within a period of time to be fixed, and whether or not it was to be paid in installments or upon such terms and conditions as the court considered proper. The court would also be given the power to stay an execution.

20. Separate actions would prescribe special limitation periods with respect to the class action.

21. An action commenced under the Act would not be settled, discontinued or dismissed for want of prosecution without the approval of the court and upon such terms and conditions including notice or otherwise, as the court considers proper.

22. A separate section of the Act would deal with appeals, which would be permitted only after leave had been given by a judge of the High Court. A further right of appeal to the Court of Appeal would be available from a judgment on the questions common to the class.

23. A number of miscellaneous provisions would provide for offers to settle, the admission of statistical evidence, the fact that a jury would not be available for a class action, the application of the Rules of Civil Procedure and so on.

SCHEDULE 2

Rule 12 - Ontario's Current Rule of Civil Procedure for Representative Proceedings.

Rules of Civil Procedure, O.Reg. 560/84

RULE 12 Representative Proceedings

WHERE AVAILABLE

12.01 Where there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

MONEY TO BE PAID INTO COURT

12.02 Any money payable to or for persons having the same interest under an order in or a settlement of a representative proceeding shall be paid into court unless the court orders otherwise.

Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540, Rule 75.

Former RULE 75

75. Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all.

SCHEDULE 3

CLASS ACTION

SUPPLEMENTARY MATERIALS

INDEX

Rules of Civil Procedure (Ontario)

1. Rule 12, Representative Proceedings, *Rules of Civil Procedure*, O.Reg. 560/84.
2. Rule 75, *Supreme Court of Ontario Rules of Practice*, R.R.O. 1980, Reg. 540.

Statutory Class Actions (Ontario)

1. *Assignments and Preferences Act*, R.S.O. 1980, c.33, subs. 12(3).
2. *Business Corporations Act*, R.S.O. 1980, c.54, s.97.

3. *Condominium Act*, R.S.O. 1980, c.84, s.14.
4. *Insurance Act*, R.S.O. 1980, c.218, s.226(1).
5. *Municipal Act*, R.S.O. 1980, c.302, s.177(2).
6. *Family Law Act, 1986* Part V.

Case Law (Ontario)

Class Actions - Generally

1. *Butler* v. *Regional Assessment Commissioner, Assessment Region No. 9* (1982), 30 O.R. (2d) 365, affirmed 143 D.L.R. (3d) 573 (Div. Ct.).
2. *General Motors of Canada Ltd.* v. *Naken* (1983), 32 C.P.C. 138, (S.C.C.).
3. *Farnham* v. *Fingold*, [1973] 2 O.R. 132, (C.A.).
4. *Murphy* v. *Webbwood Mobile Home Estates Ltd.* (1978), 19 O.R. (2d) 300, (H.C.).
5. *Olsen* v. *Cleveland*, [1973] 3 O.R. 427 (H.C.).
6. *Abraham* v. *Prosoccer Ltd.* (1980), 31 O.R. (2d) 475, (H.C.)
7. *Harrison* v. *Sinclair*, [1945] O.W.N. 399 (Master).

Class Actions by and against Trade Unions

8. *Wilkes* v. *Teichman* (1985), 1 W.D.C.P. 270 (Ont. C.A.).
9. *Dionisio* v. *Allain* (1985), 50 C.P.C. 11, (Ont. H.C.).
10. *Canning* v. *Governing Council of University of Toronto* (1984), 48 O.R. (2d) 360, (H.C.).
11. *Seafarers International Union of Canada* v. *Lawrence* (1979), 24 O.R. (2d) 257, (C.A.), leave to appeal to Supreme Court of Canada refused 24 O.R. (2d) 257n.
12. *Northdown Drywall & Construction Ltd.* v. *Austin Co.* (1975), 8 O.R. (2d) 691, (Div. Ct.).
13. *Drohan* v. *Sangamo Co.*, [1972] 3 O.R. 399 (H.C.).

Class Actions by Condominium Corporations

14. *Condominium Act*, R.S.O. 1980, c.84, s.14.

15. *Loader* v. *Rose Park Wellesley Investments Ltd.* (1980), 29 O.R. (2d), 381, (H.C.)

16. *York Condominium Corp. No. 228* v. *Tenen Invts. Ltd.* (1977), 17 O.R. (2d) 579, (H.C.)

17. *York Condominium Corporation No. 104* v. *Halliwell Terrace Ltd.* (1975), 12 O.R. (2d) 46 (H.C.).

18. *Frontenac Condominium Corporation No. 1* v. *Macciocchi & Sons Ltd.* (1974), 3 O.R. (2d) 331, reversed on other grounds 11 O.R. (2d) 649, 67 D.L.R. (3d) 199 (C.A.).

Examples – Class Actions Permitted

19. *Sugden* v. *Metropolitan Toronto Police Commissioners Board* (1978), 19 O.R. (2d) 669 (H.C.)

20. *Cobbold* v. *Time Canada Ltd.* (1976), 13 O.R. (2d) 567, (H.C.).

21. *Westinghouse Canada Ltd.* v. *Buchar* (1975), 9 O.R. (2d) 137, (C.A.)

22. *Farnham* v. *Fingold*, [1973] 2 O.R. 132, (C.A.).

23. *Korman's Electric Ltd.* v. *Schultes*, [1970] 2 O.R. 548, (H.C.)

Examples – Class Action Refused

24. *Stark* v. *Toronto Sun Publishing Corporation* (1983), 42 O.R. (2d) 791, (H.C.).

25. *Dehler* v. *Ottawa Civic Hospital* (1979), 25 O.R. (2d) 748, affirmed 29 O.R. (2d) 677 (C.A.).

26. *Judge* v. *Muslim Society of Toronto Inc.*, [1973] 2 O.R. 45 (H.C.).

27. *Murphy* v. *Webbwood Mobile Home Estates Ltd.* (1978), 19 O.R. (2d) 300, (H.C.).

28. *Stephenson* v. *Air Canada* (1979), 26 O.R. (2d) 369, (H.C.).

29. *Winchell* v. *Del Zotto* (1976), 1 C.P.C. 338 (Ont. H.C.).

CLASS ACTIONS IN CANADA: THE PATH TO REFORM?

By Andrew J. Roman*

INTRODUCTION

The leading case on class actions in Canada, the 1983 judgment of the Supreme Court of Canada in *General Motors of Canada v. Naken,*[1] issued an important challenge to the legislative branch of government: the class action rule needs amendment, but such change should not be made by courts but by the legislature. Legislatures, however, have yet to respond.

Of the several law reform commissions in Canada, only the Ontario Law Reform Commission (OLRC) has done anything with this issue. Its research, however, was so extensive that there is hardly a need to do more. The OLRC's 1982 *Report on Class Actions* is in three volumes, totalling almost 900 pages. It contains a wealth of empirical information about class actions, a great deal of it statistics obtained from the U.S. It also provides a detailed examination of reported cases from several countries. It would be difficult to find a more comprehensive study of the subject anywhere. Unfortunately, the OLRC's proposals for reform were not as persuasive as its research.

The proposals appear to be the product of different minds and sets of values. The then Chairman of the Commission dissented from some of its recommendations. The OLRC's draft legislation is exceedingly complex and sets so many and such costly hurdles in the way of a prospective class action plaintiff as to make it improbable that anyone in Ontario would ever commence a class action. A report of a joint Canadian Bar Association (Ontario)/Public Interest Research Centre Committee was rather critical of it on that ground.[2]

By way of contrast, in Quebec, somewhat simpler legislation has been introduced,[3] with a unique Fund to assist prospective plaintiffs to commence and conduct their actions. Because Canadian courts use the English system of awarding attorneys fees and expenses to the successful party, to be paid by the loser, the Fund is popular both with plaintiffs and with successful class action defendants, who obtain their costs from the Fund. The Quebec experience with class actions, however, has also been less than satisfactory in the sense that a rather negative judicial attitude has interpreted the Quebec legislation (which is based on U.S. FRCP 23, as are the OLRC's proposals) so as to make it very difficult to obtain court approval to maintain a class action.[4]

The U.S., of course, has no shortage of reform proposals for class actions. Nevertheless, most of these appear to be detailed tinkering with

the wording of particular requirements for certification.[5] None seem to question seriously the need for certification itself.

Elsewhere, the issue continues to be an open one. In Ontario, in August of 1988, the Uniform Law Conference will review the subject of class actions, including the issue of whether or not certification is desirable. In Australia, the Australian Law Reform Commission (ALRC), after studying the subject on and off for close to a decade, and after releasing a discussion paper[6] and various consultation documents, is now circulating a draft bill called the *Federal Court (Grouped Proceedings) Bill 1988.* The writer, who is a North American consultant to the ALRC on this project, has been permitted to disclose that the final version of the draft bill will be released at the end of August, 1988.

The ALRC's approach to reform is to avoid certification. A defendant still has the right to bring a motion to strike out a grouped proceeding, as is now the case in Australia, the U.K. and Canada (except for Quebec, which uses the certification approach). This is an important conceptual as well as a procedural difference.

THE U.S. AND THE AUSTRALIAN MODELS

The theory underlying the requirement that a class action be certified by the court is a complex mixture of factual assumptions and value judgments. The most important of these is the need to protect 'absentees', although it is never made clear how much protection they need, at which stages of the action, and from what. Because class actions are brought in a representative capacity, the class plaintiff represents others who are 'absentees'. The legal rights of absentees are also advanced by the class plaintiff. If he or she loses, this extinguishes any further opportunity for class members to sue because their claims would be extinguished by the principle of *res judicata.*

To be permitted to bring a class action, the representative plaintiff will normally have to show, both in the U.S. and in Quebec, among other things, that the number of plaintiffs being represented is sufficiently large to justify a class action (the 'numerosity' requirement). Also, the plaintiff will have to prove that he or she is a worthy representative of the class and can represent all of its members adequately (the 'representativeness' requirement). Experience has shown that in the hands of a competent defence counsel the proof of these two threshold issues alone can be time-consuming and expensive.

The preliminary matter of certification, intended to be a mini-hearing, usually turns into a maxi-hearing. It can quite often be more

complex than the trial of the substantive issues (if the case ever proceeds that far) and, as there is so much discretion involved, there are often several appeals. The result in the U.S. and in Quebec has been that certification serves as a chilling deterrent to the use of class actions. There has been a steady decline in the number of class actions at the same time litigation in general would appear to be increasing modestly.[7]

The OLRC report provides a valuable analysis of the class action on the basis of whether the quantum of damages claimed would be individually recoverable or non-recoverable if separate actions were brought. In a situation such as an airline crash, undoubtedly the damages likely to be awarded would make litigation individually worthwhile and, hence, the damages would be individually recoverable. In such cases, it is not likely to be necessary to proceed as a class action. The same can be said for the Dalkon Shield or Johns-Manville asbestosis cases. Indeed, bankruptcy proceedings have been resorted to by Robbins in the Dalkon Shield litigation precisely because plaintiffs' counsel successfully resisted judicial attempts to create a compulsory class action.

Whether the law should be reformed to allow a judge to compel a class action is an interesting question. To discuss it properly would require a lengthy dialogue beyond the scope of this paper. Suffice it to say that where there is a limited pot of dollars which is unlikely to cover more than a fraction of the outstanding claims, to avoid a scramble to the courthouse door, some sort of compulsory collective proceeding should be considered. This would permit each victim to receive a certain number of cents on the dollar rather than the first few receiving full compensation and the majority, nothing.

The assumption that absentee class members need extensive protection at the pre-trial stage is a questionable one in light of what has been said about individually recoverable and non-recoverable cases. If the level of damages is individually recoverable, everyone can afford to (and often will) opt out of a class action to litigate on their own. In the more usual class action situation, however, the damages are not individually recoverable and the "right" of absentees to sue individually is, therefore, of no real value.

For example, if Time Magazine closes its Canadian edition and X, a subscriber, has been deprived of a couple of issues, X is unlikely to take the trouble to sue. If another subscriber, Y, is irate enough to do so, X would say "more power to him". If Y loses, X has really lost nothing of any value; if Y wins, X obtains what is virtually a windfall gain, or found money. But, if procedural hurdles make it unlikely that anyone will wish to sue (because it may cost $100,000 and five years of appeals

to obtain one's day in court), all of the absentees will have been done a disservice in the guise of protecting them. The majority of the unsuccessful certification applications – whether they involve excessively onerous notice requirements (as in *Eisen*[8]) or excessively strict requirements about the representativeness of the plaintiff (as in *Nault*[9]) – fail because of the almost perverse desire to protect a valueless right to bring an individual suit. With adequate provision to permit opting out, which presupposes adequate notice, certification is redundant.

The philosophical underpinning of the U.S. model (and its imitators in Quebec and the OLRC Report) is the notion that litigation is something between individuals, A versus B. This may have been true in the last century but today is an anachronism. In an age of mass marketing, mass transit, and the widespread use of chemicals with long latency periods, we have the serious prospect of mass injuries. The adherence to a 'horse-and-buggy-age' view of the litigation system can surely result only in two equally unpalatable alternatives: a litigation explosion of individual actions or, more likely, the denial of access to justice by forcing prospective plaintiffs to "lump it" because more efficient methods of litigation remain unavailable.

The process of certification denies a fundamental interest: the interest of a prospective plaintiff in bringing his or her dispute before the court in the most efficient and effective manner, in the judgment of the plaintiff's counsel. Anything but the traditional A versus B litigation is treated as if it were a legal freak, a Frankenstein monster so dangerous that it must be kept in a cage until the plaintiff (or plaintiff's lawyer) has devoted a massive investment of time and money to a largely irrelevant ordeal. This procedure imposes an anomalous type of reverse onus. Rather than the plaintiff bringing the action in the normal course on the theory that it is, after all, the plaintiff's case, he or she must first discharge a very onerous burden of evidence and argument. The purpose of certification appears to be to force the plaintiff to commence the action on bended knee; before the case even begins, he or she is put on the defensive. No other type of plaintiff is required to go through this kind of torture test in order to obtain a day in court. The root of the problem is not this or that part of the certification test but the process of certification itself.

Given the usual defendant (a government, major corporation or union – after all, who else has the opportunity to inflict mass injury), certification applications will be fiercely resisted. For example, in a Quebec case[10] in which the Director of Combines Investigation and Research found as a result of his investigation that the major oil

companies had together overcharged consumers by some $12 or $13 billion, a consumer tried to bring a class action under the new class actions law. In response to the application for certification, the defendant oil companies introduced much of the evidence they had submitted during the combines investigation and hearing before the Restrictive Trade Practices Commission, appended to a reply affidavit. All of this was designed to show that the applicant's case was without merit and should be struck out. The hearing before the Restrictive Trade Practices Commission took several years and must have cost millions in legal and expert witness fees. If a certification hearing can so easily be turned into a major event, it can not only bankrupt the applicant but also quickly deplete the small Fund designed to provide legal aid to such applicants.

Quebec has taken a rather unusual step, in its 1982 round of amendments to its class actions legislation,[11] of preventing the defendant from appealing an authorization granted to a plaintiff, although the latter can do so if authorization is refused. Although it is interlocutory in its effect on the defendant but final for the plaintiff, nevertheless, this results in an inequality of treatment between the parties which seems difficult to justify on any but the pragmatic ground of encouraging more class actions. Surely it is less convoluted to do away with certification altogether than to require parties to continue to engage in such epic battles with unequal procedural rights.

The notion that one doesn't need anyone's permission to commence a class action may sound horrifying to those who were nursed on FRCP Rule 23. However, in England, Australia and Canada (except for Quebec), certification is not presently a requirement. If a defendant feels that a class action is inappropriate, the normal procedure is to move to strike it out, with the onus being on the defendant to show the action should *not* be tried that way rather than on the plaintiff to show that it should.

The ALRC draft bill proposes the first major liberalization of class actions in a Commonwealth jurisdiction without resort to the certification aspect of the American model. The Australian reforms do, of course, otherwise recognize the need to protect absentees: to require notice to members so as to render effective their right to opt out; to have the court control legal fees; to require court approval of any settlement, and other such common sense protections. However, the basic thrust is to treat 'grouped proceedings' as a normal aspect of litigation rather than as a monster.

THE WAY AHEAD FOR CANADA

When the new class actions legislation was introduced in Quebec, it was estimated that there would be approximately 500 cases a year.[12] By the end of the ninth year, there had only been 205 applications in total of which 54 had been authorized.[13]

It has been observed that the type of class action which will arise in any jurisdiction is a function not only of the procedural rules but of the substantive law in that jurisdiction.[14] For example, in the U.S. the reason there have been so many anti-trust suits brought as class actions is because U.S. anti-trust legislation is effective, making litigation worthwhile, and the statutory provision for treble damages creates a powerful economic incentive. There is no comparable legislation in England, Canada or Australia. In Quebec, despite procedural rules for class actions very similar to those of the U.S., the actions brought have been quite different. A number of class actions have been brought against governments and labour unions. Remarkably few tort or contract cases have been brought against corporations. However, despite the fact that Quebec has a civil law system quite different from that of most of the U.S., the common factor of certification has created a host of authorization judgments of Quebec courts which, translated into English, could as well have been written by American courts.

To authorization Quebec has added a further layer of screening in the form of its Fund. Most plaintiffs who apply to the Fund and are refused do not proceed even to the application for authorization stage. The ALRC's similar funding device should also provide a type of screening mechanism for funding those actions which, in the opinion of a panel of lawyers reviewing the action, have some basic merit. Although some Australian jurisdictions allow contingency fees (and Ontario, the last holdout in Canada, is also about to allow them) this need not give any concern about class actions being thereby encouraged. As a result of the rule in the *Lindy*[15] case, in the U.S. legal fees and disbursements in class actions are controlled by the court and designed to achieve an award that approximates what a plaintiff's counsel would have obtained had a reasonable hourly rate been set. The Canadian and Australian traditions unquestionably will involve court supervision in reviewing contingency retainers. Indeed, like the OLRC, the ALRC proposal expressly requires this. For all these reasons, plus the fact that there really aren't that many mass disasters occurring in any particular year, it is unlikely that the liberalization of class actions in Australia will open the floodgates of class action litigation.

The opposite risk, that the liberalization won't go far enough, is also avoided with ALRC's model. That is because there are express provisions over-ruling the earlier cases[16] which require such a high degree of homogeneity among the plaintiffs as to render an 'appropriate' class exceedingly rare. The draft bill would permit group proceedings if at least one question that would arise in the action is the same in all of the plaintiffs' cases and the cause of action similar or related. To override the case law, the proposal states that the causes of action shall not be taken to be dissimilar or unrelated merely because they arise out of different contracts or events.

Class actions legislation can be fairly streamlined as in the ALRC proposal, or may contain numerous bells and whistles as in the OLRC draft bill. A discussion of the merits of each of these could occupy many pages. In general, in rules of practice as in architecture, "less is more".

CONCLUSION

The ALRC model, which was developed with the benefit of both the OLRC report and the analysis of several years of Quebec experience, is probably the most modern and best designed class action legislation in existence. Like Quebec, it recognizes the importance of costs where the damages involved are individually non-recoverable, by establishing a fund to assist class plaintiffs. It also avoids the enormous deterrent of certification which shifts the entire focus of the litigation away from the substantive issues of liability and injury to an investigation of the attributes of the hapless would-be class representative. Thus, the ALRC draft bill normalizes class actions, making them a practical alternative to a multiplicity of individual actions (where the amounts involved are individually recoverable) and makes litigation itself feasible (where the amounts involved are individually non-recoverable).

For Canada, the ALRC draft bill represents a less radical departure from the traditional Anglo-Canadian method of litigation than does adoption of the U.S./Quebec certification model. It is also more access-enhancing. There are some who will complain that if the courts are made more accessible, people are more likely to use them. Depending upon one's view to whether this is a benefit or a curse, one can select either one or the other model of class action.

It may be that if the ALRC draft bill is enacted as legislation, after a few years' experience we will find that the practical difference between the two models is not as great as has been anticipated. That will depend in large measure on the extent to which the draft bill is watered down in passage, the rules that are developed by the Federal Court to implement

it, the kinds of cases brought the first few times the law is used, and the judicial reaction to them. Nevertheless, for those who believe that court efficiency and access to justice are important social goals which can be advanced by class action procedures, it is difficult to dispute that the more efficient and access-enhancing the procedures themselves, the more likely it is that their goals will be achieved. Judged in these terms, the ALRC draft bill is the clear winner.

---

*Of the Ontario Bar, and a member of the Advocates' Society.

ENDNOTES

(1) [1983] 1 S C R 72, (1983), 144 D.L.R. (3d) 385

(2) *Report on Class Actions*, November, 1983.

(3) Proclaimed in force January 1979, now part of the Code of Civil Procedure of Quebec: L R Q./R.S Q , c.-C-25

(4) For a discussion of these difficulties see H Patrick Glenn, Class Actions in Ontario and Quebec, (1984) 62 *Canadian Bar Review* 247, also J. Robert S. Prichard, Class Actions Reform: Some General Comments, (1984) 9 Can Bus. L J 309, 313

(5) See for example, Stephen Berry, Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action (1980), 80 Col L Rev 299; Arthur R. Miller, of Frankenstein Monsters and Shining Knights: Myth, Reality and the 'Class Action Problem' (1979), 92 Harv L. Rev 664; The Proposed Uniform Class Actions Act (1981) 4 C A.R. 181; John E Kennedy, Federal Class Actions: A Need for Legislative Reform, (1979) 32 Southwestern L. J. 1209

(6) DP11, Access to the Courts - II Class Actions, 1979.

(7) See 10 C A.R 1. In 1986 the number of class actions filed decreased 24 2% vs. 1985, the ninth decrease in the last ten years. As a percentage of total civil actions they represented 0 3%. For Quebec, the nine years from January 1979 to March 1987 saw a total of 205 applications for authorization (the Quebec term for certification) Of those which have been resolved, 54 were authorized and 77 denied. A total of 52 have, after appeals, been authorized of which 6 are in preparation for trial and 46 have started the trial process. Of these, plaintiffs have won 10, lost 3, and 17 were settled; 1 was abandoned and 15 are still in process. Class actions represent about 0 4% of total litigation in the Quebec Superior Court. See the Annual Report of the Fonds d'aide aux recours collectifs, 1986, and 1987 updates

(8) *Eisen v. Carlisle & Jacquelin et al* (1974) 417 U.S 154 (Sup. Ct.)

(9) *Nault v. Canadian Consumers Co Ltd.*, [*1981*] 1 S C R. 553 (S C.C.)

(10) *Texaco Canada v. Forget*, unreported, C S Montreal file no 500-06-000009-866, Nov. 1987.

(11) L Q /S Q. 1982 c 37 art 22, amending art 1010 of the C C P of Quebec

(12) See Glenn, note 4, above

(13) See note 7, above

(14) Benjamin S DuVal, Jr., Book Review of the OLRC Report on Class Actions (1983) 3 Windsor Yearbook of Access to Justice, 411, 431.

(15) *Lindy Bros. Builders Inc v. American Radiator and Standard Sanitary Corp* (CA3d, 1973) 487 F2d 161; also *In re Fine Paper Antitrust Litigation* (CA3d, 1984) 751 F2d 562.

(16) In particular the very narrow ruling in the leading English case, *Markt & Co Ltd v Knight* [1910] 2 KB 1021 as moderated somewhat by *Prudential Insurance v. Newman* [1981] Ch. 229, [1979] 2 All E.R. 507

APPENDIX C

(See page 29)

THE UNIFORM CUSTODY AND ACCESS JURISDICTION AND ENFORCEMENT ACT

1. (1) In this Act,

(a) "access order" means (a) a provision in an order of a court in or outside (enacting jurisdiction) the effect of which is to grant access to a child at specific times or dates; or (b) a provision the effect of which is to grant access to a child at specific times or dates in a separation agreement, that is enforceable under the law of the jurisdiction in which the agreement was made;

Source: New.

Commentary: There was no existing definition of access order in Uniform Acts. This definition parallels the definition of custody order. It is limited to specific times and dates.

(b) "court" means *(as determined by enacting jurisdiction)*;*

Source: UCJEA s. 1(1)(a).

(c) "custody order" means (a) a provision in an order of a court in or outside (enacting jurisdiction) the effect of which is to grant custody or guardianship of a child; (b) a provision the effect of which is to grant custody or guardianship of a child in separation agreement, that is enforceable under the law of jurisdiction in which the agreement was made; or (c) a right of custody or guardianship created by law in or outside (enacting jurisdiction);

Source: New.

Commentary: A new definition is needed to expand on the normal understanding of the term "custody" to include separation agreements and rights to custody at law. The policy behind this definition is to enlarge the scope of application of the Uniform Act to situations now covered by the Hague Convention on International Child Abduction.

(d) "extra-provincial order" means *a custody or access* order of an extra-provincial *court*:

Source: UCJEA s. 1(1)(b).

(e) "extra-provincial *court*" means a court *of competent jurisdiction* outside (enacting jurisdiction) that has jurisdiction to grant *a custody or access order*;

Source: UCJEA s. 1(1)(c).

(f) "Responsible Authority" means the Responsible Authority referred to in section 3.

Source: New.

Commentary: The purpose of this subsection is to define an administrative authority similar to the Central authority created by the Hague Convention but it allows jurisdictions to vary.

(2) A reference in this Act to a child is a reference to the child while *under the age of majority in accordance with the law of the jurisdiction in which the custody or access order was made.*

Source: UCJEA s. 1(2).

Commentary: This definition of "child" provides a standard to determine minority; it is consistent with adopting the order of the original jurisdiction for enforcement.

2. The purposes of this Act are,

(a) to provide for the more effective enforcement of custody orders and for the recognition and enforcement of custody orders made outside (enacting jurisdiction) *by securing the prompt return of the child wrongfully removed or retained*;

Source: UCJEA s. 2(d).

Commentary: Changes were made to the existing subsection 2(d) of the UCJEA to emphasize the policy that the return of the child should constitute a priority as under the Hague Convention.

(b) to provide for the more effective enforcement of access orders and for the recognition and enforcement of access orders made outside (enacting jurisdiction), recognizing that the child has a right to contact in accordance with the access order with those entitled to access to the child;

Source: New.

(c) to provide for the more effective enforcement of custody and access orders made within (enacting jurisdiction);

Source: New.

Commentary: This subsection underlines the fact that the proposed Uniform Act has an intraprovincial character; it completes subsections 2(a) and (b).

(d) to recognize that the concurrent exercise of jurisdiction by *courts* of more than one *jurisdiction* in respect of the custody of *or access to* the same child ought to be avoided;

Source: UCJEA s. 2(b).

Commentary: The existing subsection 2(b) of the UCJEA has been modified because under the proposed system, the provisions concerning declining jurisdiction are useless and may be confusing since the proposed Uniform Act gives jurisdiction, unless there are exceptional circumstances, to the court of the habitual residence of the child.

(e) to discourage the abduction of *a child and to encourage* the determination of custody *and access* by due process *by a court of competent jurisdiction*; and

Source: UCJEA s. 2(c).

Commentary: Minor changes were made to the existing subsection 2(c) of the UCJEA.

(f) to encourage the provision of administrative mechanisms to assist in the enforcement of custody and access orders.

Source: New.

Commentary: The purpose of this subsection is to point out one of the major features of the proposed Uniform Act that is the establishment, at the interprovincial level, of administrative mechanisms similar to those existing under the Hague Convention.

Enforcement by Responsible Authority

3. (1) The Lieutenant Governor in Council (or Attorney General) shall designate a person or body of persons to be the Responsible Authority.

Source: New.

Commentary: This subsection allows for the establishment of an administrative mechanism recognizing that orders involving children are, to a degree, a state responsibility.

(2) An application for enforcement of a custody or access order may be made to the Responsible Authority to insure compliance with the order.

Source: New.

(3) Where the applicant or Responsible Authority has reason to believe the child is located in a jurisdiction outside (enacting jurisdiction), the Responsible Authority shall forthwith transmit any application for enforcement of a custody or access order to the Responsible Authority of that jurisdiction or, as the case may be, to similar authorities, if any, in jurisdictions outside Canada where there is reason to believe the child is located.

Source: New.

Commentary: The purpose of this subsection is essentially to save time and, in particular, to maximize the chances to locate abducted children.

(4) Subject to subsection (7), on receipt of an application for enforcement of a custody or access order, the Responsible Authority of (enacting jurisdiction) may take any measures appropriate in the circumstances, including but not limited to:

(a) locating the whereabouts of the child to which the application relates;

(b) safeguarding the safety of the child;

(c) securing the voluntary compliance with the order or bringing about an amicable resolution of the issues;

(d) with respect to a custody order, commencing or facilitating proceedings to secure the prompt and safe return of the child to the applicant;

(e) with respect to an access order, commencing or faciitating proceedings to enforce the order.

Source: New.

Commentary: This subsection enumerates some functions that may be discharged by the Responsible Authority. This is a general and non-exhaustive list because the proposed Uniform Act allows for jurisdictional variations in the degree and scope of services offered.

(5) The Responsible Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Source: New.

Commentary: This subsection aims to resolve a procedural problem encountered in some jurisdictions.

(6) The Responsible Authority shall act expeditiously in taking the measures provided for in subsection (4).

Source: New.

Commentary: This subsection states that if the Responsible Authority decides to act according to subsection (4), it must act rapidly. Obviously, this subsection imposes impliedly on the Responsible Authority the obligation to decide rapidly if it is appropriate or not to take measures in each particular case.

(7) The Responsible Authority may decline to act and where it does so, it shall forward its reason in writing to the applicant or Responsible Authority through which the application was submitted.

Source: New.

Commentary: This subsection reiterates the discretion of the Responsible Authority not to act but obliges the latter to give reasons in writing. It means that the Responsible Authority must not exercise arbitrarily this discretion.

(8) Subject to subsection (9), the Responsible Authority shall not charge the applicant any fee for services provided by the Responsible Authority or on its behalf in relation to applications submitted to it.

Source: New.

Commentary: This subsection states the fundamental principle,

recognized in the Hague Convention, that the applicant shall not pay for the administrative services provided by the Responsible Authority.

(9) The Responsible Authority may require the applicant to pay the expenses incurred or to be incurred in implementing the return of the child.

Source: New.

Commentary: This section allows the Responsible Authority to recover some costs and expenses from the applicant by administrative process.

(10) This section shall not preclude any person who claims that there has been a breach of a custody or access order from applying directly to any competent court in Canada for the enforcement or modification of the person's right.

Source: New.

Commentary: This subsection allows for the option of private enforcement instead of enforcement by Responsible Authority.

(11) The Lieutenant Governor in Council may, by regulation, specify the information required in and documents to be provided with any applications made to the Responsible Authority under subsection 3(2).

Source: New.

Commentary: Such a regulation aims to inform about specific administrative requirements of each jurisdiction. This subsection allows for jurisdictional variation on these matters.

Jurisdiction

4. (1) *For the purposes of making a custody or access order pursuant to the law of (enacting jurisdiction) or for the purpose of article 5, a court has jurisdiction where:*

(a) the child is habitually resident *in the jurisdiction* at the commencement of the application for the order;

Source: UCJEA, s. 3(1)(a).

Commentary: Technical wording changes were made to the existing subsection 3(1)(a) of the UCJEA.

(b) although the child is not habitually resident *in the jurisdiction*, the court is satisfied,

(i) that the child is physically present *in the jurisdiction* at the commencement of the application for the order,

(ii) that substantial evidence concerning the best interests of the child is available *in the jurisdiction*,

(iii) that no application for custody of *or access to* the child is pending before an extra-provincial *court* in another place where the child is habitually resident,

(iv) *that no application under sectin 5 is pending before the court or may be made within a reasonable time*,

(v) that no extra-provincial order in respect of custody of *or access to* the child has been recognized by a court *in the jurisdiction*,

(vi) that the child has a real and substantial connection with *the jurisdiction*, and

(vii) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in *the jurisdiction*; or

Source: UCJEA, s. 3(1)(b).

Commentary: This subsection reproduces essentially the existing subsection 3(1)(b) of the UCJEA with technical wording changes and adds, at clause 4(1)(b)(iv), a new condition to allow a court to exercise jurisdiction when the child is not habitually resident in the jurisdiction. Under this clause, the court may exercise its jurisdiciton if no application to enforce a custody or access order is pending before the court or may be made within a reasonable time.

(c) both parties have consented to the court having jurisdiction.

Source: New.

Commentary: This subsection states that the voluntary submission of the parties to the jurisdiction of the court is also a valid jurisdictional basis.

(2) A child is habitually resident in the place where he *or she* resided,

(a) with both parents;

(b) where the parents are living separate and apart, with one parent under a separation agreement or with the implied consent of the other or under a court order; or

(c) with a person other than a parent on a permanent basis for a significant period of time,

whichever last occurred.

Source: UCJEA s. 3(2).

Commentary: Technical wording changes were made to the existing subsection 3(2) of the UCJEA.

(3) The removal or withholding of a child without the consent of the person *entitled to custody pursuant to a custody order* does not alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing due process by the person from whom the child is removed or withheld.

Source: UCJEA s. 3(3).

Commentary: Technical wording changes were made to the existing subsection 3(3) of the UCJEA.

Enforcement by court

5. (1) Subject to subsections (2) and (3), a court on application shall enforce and may take such orders as it considers necessary to give effect to a custody or access order.

Source: New.

(2) *The court may refuse to enforce the custody order if* the child is physically present in (enacting jurisdiction) and

(a) *the court is satisfied that the person legally entitled to the custody of the child was not actually exercising the rights under the custody order at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention*;

(b) the court is satisfied that the child would suffer serious harm if

(i) the child *remains* in the custody of the person legally entitled to custody of the child;

(ii) the child *is* returned to the custody of the person legally entitled to the custody of the child, or

(iii) the child *is* removed from (enacting jurisdiction); or

(c) *the court that made the order did not at the time of making the order have jurisdiction to do so in accordance with section 4.*

Sources: UCJEA, s. 4 and 9.

Commentary: Changes were made to the existing sections 4 and 9 of the UCJEA to emphasize the policy that the return of the child to his or her habitual residence is the priority and that the only possible objections to this return are the exceptional circumstances listed in this section. Clause 5(2)(a) adds two circumstances, copied from clause 13(a) of the Hague Convention, for refusing to return the child.

(3) The court may refuse to enforce the access order if the child is physically present in (enacting jurisdiction) and

(a) the court is satisfied that the person legally entitled to access to the child was not actually exercising the rights under the access order at the time of removal of retention, or had consented to or subsequently acquiesced in the removal or retention;

(b) the court is satisfied that the child would suffer serious harm if

(i) the child remains subject to access by the person legally entitled to access to the child; or

(ii) the child is removed from (enacting jurisdiction); or

(c) the court that made the order did not at the time of making the order have jurisdiction to do so in accordance with section 4.

Source: New.

Commentary: This subsection parallels subsection 2 to the extent applicable to access orders.

6. Subject to subsections 5(2) and (3), the fact that a conflicting custody or access order has been made in (enacting jurisdiction) shall not be a ground for refusing to enforce a previous custody or access order made outside (enacting jurisdiction).

Source: New.

Commentary: This section is designed to remove any jurisdictional hurdles or difficulties based on an existing court order in the enforcing jurisdiction.

Remedies

8. Where the court orders the return of the child, it may make such interim orders in respect of custody or access in the best interests of the child to ensure the child's return to the person entitled to the custody of the child and may make such order conditional on prompt commencement of action in the jurisdiction of the habitual residence and attach such other conditions to the orders the court considers appropriate, including conditions relating to the payment for costs for reasonable travel and other expenses related to the proceedings.

Source: New.

Commentary: This section allows for interim orders to be made to deal with the child pending its return.

9. (1) Upon application a court may direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred or to be incurred by the applicant or Responsible Authority, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

(2) Where it is necesary to enforce the order outside (enacting jurisdiction) in a jurisdiction designated under the *Reciprocal Enforcement of Judgments Act*, that Act will apply.

Source: New.

Commentary: This subsection, which reproduces in part section 26 paragraph 4 of the Hague Convention, allows various rights of recovery of expenses against the absconding parent or the parent who prevented the exercise of rights of access, as the case may be.

10. Upon application, a court may make an order restraining a peson from molesting, annoying, harrassing, *communicating or otherwise interfering with* the applicant or a child in the lawful *care* of the applicant and may require the respondent to enter into such recognizance or to post a bond as the court considers appropriate.

Source: UCJEA s. 10.

Commentary: Minor changes were made to the existing section 10 of the UCJEA. Particularly, sureties were not seen as practical or necessary for the circumstances.

11. (1) Where a court is satisfied upon application by a person *entitled to the custody of or to the access to a child pursuant to a custody or access order* that there are reasonable and probable grounds for believing that any person is unlawfully withholding the child from the applicant, the court by order may authorize the applicant or someone on his behalf to apprehend the child for the purpose of giving effect to the rights of the applicant to custody or access.

Source: UCJEA s. 11(1).

Commentary: Changes were made to the existing subsection 11(1) of the UCJEA to cover rights of custody created by law. The enacting jurisdiction may add a provision that would specify the persons authorized to apprehend the child. For instance, such a provision could state that a police officer or a member of a child caring agency must accompany the applicant.

(2) Where a court is satisfied upon application that there are reasonable and probable grounds for believing,

(a) that any person is unlawfully withholding a child from a person entitled to custody of *or access to* the child;

(b) that a person who is prohibited by court order or separation agreement from removing a child from (enacting jurisdiction) proposes to remove the child or have the child removed from (enacting jurisdiction); or

(c) that a person who is entitled to access to a child proposes to remove the child or to have the child removed from (enacting jurisdiction) and that the child is not likely to return,

the court by order may direct the sheriff, *police officer*

or; (member of a child caring agency], or any of them, having jurisdiction in any area where it appears to the court that the child may be, to locate, apprehend and deliver the child to the person named in the order and, for these purposes, to enter and search any place where he has reasonable and probable grounds for believing that the child may be.

Source: UCJEA s. 11(2) and (5).

Commentary: Changes were made to the existing subsection 11(2) of the UCJEA to add to the list of persons empowered to locate and apprehend the child any member of a child caring agency. Subsection 11(5) of the UCJEA was merged in this new subsection.

(3) An order may be made under subsections *(1) and* (2) upon an application without notice where the court is satisfied that it is necessary that action be taken without delay.

Source: UCJEA s. 11(3).

Commentary: Changes were made to the existing subsection 11(3) of the UCJEA to allow applications without notices where there is an emergency and the applicant himself or someone on his behalf want to apprehend the child.

(4) The sherrif, *police officer or* [*member of a child caring agency*] directed to act by an order under subsection (2) shall do all things reasonably able to be done to locate, apprehend and deliver the child in accordance with the order.

Source: UCJEA s. 11(4).

12. (1) Where a court, upon application, is satisfied upon reasonable and probable grounds that a person

(a) prohibited by court order or separation agreement from removing a child from (enacting jurisdiction) *intends to remove a* child from (enacting jurisdiction); or

(b) entitled to access to a child *intends to remove a* child from (enacting jurisdiction) and is not likely to return the child to (enacting jurisdiction),

the court in order to prevent the removal of the child from (enacting jurisdiction) may make one or more of the following orders:

1. *Order a person to* transfer specific property to a named trustee to be held subject to the terms and conditions specified in the order;

2. *Order a person from* whom payments have been ordered for the support of the child, to make the payments to a specified trustee subject to the terms and conditions specified in the order;

3. *Order a person to* post a bond payable to the applicant in such amount as the court considers appropriate; or

4. *Order a person to* deliver the person's passport, the child's passport and any other travel documents of either of them that the court may specify to the court or to an individual or body specified by the court.

Source: UCJEA s. 12(1) to (3).

Commentary: This subsection reorganizes the existing subsections 12(1) to (3) of the UCJEA. Technical wording changes were made but no policy changes.

(2) In an order under *subsection (1)*, the court, as the case may be, may specify terms and conditions for the return or the disposition of the property or give such directions in respect of the safekeeping of the property, payments, passports or travel documents.

Source: UCJEA s. 12(5) and (7).

Commentary: Subsections 12(5) and (7) of the UCJEA have been merged.

13. (1) Where a court, upon application, is satisfied that a person in whose favour an order has been made for access to a child at specific times or on specific days has been wrongfully denied access to the child by a person in whose favour an order has been made for custody of the child, the court may make one or more of the following orders, where it would be in the best interests of the child:

(a) require the respondent to give the applicant compensatory access to the child for the period agreed to by the parties, or for the period the court considers appropriate if the parties do not agree;

(b) require supervision of the access;

(c) require the respondent to reimburse the applicant for any reasonable expenses actually incurred as a result of the wrongful denial of access;

(d) require the responsdent to give security for the performance of his or her obligation to give the applicant access to the child;

(e) with the consent of the parties, appoint a mediator to assist them in resolving the issue.

(2) A period of compensatory access shall not be longer than the period of access that was wrongfully denied.

(3) A denial of access is wrongful unless it is justified by a legitimate reason such as one of the following:

1. The respondent believed on reasonable grounds that there would be a substantial risk of serious physical or emotional harm to the child if the right of access were exercised.

2. The respondent believed on reasonable grounds that he or she might suffer physical harm if the right of access were exercised.

3. The respondent believed on reasonable grounds that the applicant was impaired by alcohol or a drug at the time of access.

4. The applicant failed to present himself or herself to exercise the right of access within one hour of the time specified in the order or the time otherwise agreed on by the parties.

5. The respondent believed on reasonable grounds that the child was suffering from an illness of such a nature that it was not appropriate in the circumstances that the right of access be exercised.

6. The applicant did not satisfy written conditions concerning access that were agreed to by the parties or that form part of the order for access.

7. On other occasions, during the preceding year, the applicant, contrarily to the reasonable expectations of the

custodial parent, had failed, without reasonable notice and excuse, to exercise the right of access.

8. The applicant had informed the respondent that he or she would not seek to exercise the right of access on the occasion in question.

Source: New.

Commentary: These provisions provide a new remedy for access enforcement that is an alternative to jail or fines upon contempt. Compensatory access gives back time wrongfully denied. It also contemplates supervision and mediation as well as reimbursement for expenses incurred. It provides guidelines similar to Michigan's for determining when access may be properly denied.

(4) Where the court, upon application, is satisfied that a person in whose favour an order has been made for access to the child has wrongfully failed to exercise the right of access or to return the child as the order requires, the court may make one or more of the following orders:

(a) require supervision of the access;

(b) require the respondent to reimburse the applicant for any reasonable expenses actually incurred as a result of the failure to exercise the right of access or to return the child as the order requires;

(c) require the respondent to give security for the performance of his or her obligation to exercise the right of access and to return the child as the order requires;

(d) with the consent of the parties, appoint a mediator to assist them in resolving the issue.

(5) Failure to exercise the right of access or to return the child as the order requires is wrongful unless,

(a) it is justified by a legitimate reason; and

(b) the respondent gave the applicant reasonable notice of the failure and of the reason.

Source: New.

Commentary: This is a new access remedy for the custodial parent

to secure the exercise of access by the other parent. It also contemplates supervision, mediation, reimbursement for expenses and posting of security.

(6) If the court is satisfied that a person has made an application under subsection (1) or (4) in bad faith, the court may prohibit him or her from making further applications without leave of the court.

Source: New.

Commentary: This is designed to prevent abuse of either remedy by hostile parties.

14. (1) The Responsible Authority may, for the purposes of enforcing a custody *or access* order,

(a) demand and receive from any person or public body, including the Crown in right of (enacting jurisdiction), information as to the location, address and place of employment of the person against whom the order is being enforced; and

(b) provide information obtained under clause (a) to a person performing similar functions in another jurisidiction.

Source: UMCEA s. 6(1).

(2) Information obtained under clause (1)(a) shall not be disclosed to any person except as provided in clause (1)(b) or to the extent necessary for the enforcement of the order.

Source: UMCEA s. 6(2).

(3) Where, on motion to a court, it appears that the Responsible Authority has been refused information, after making a demand under clause (1)(a), the court may order any person or public body, including the Crown in right of (enacting jurisdiction), to provide the Responsible Authority with any information as to the location, address or place of employment of the person against whom the order is being enforced.

Source: UMCEA s. 6(3).

(4) Where the Responsible Authority has been refused information after making a demand under clause (1)(a) and obtains an order under subsection (3), the court shall award the costs of the motion to the Responsible Authority.

Source: UMCEA s. 6(5).

(5) Information obtained under an order under subsection (3) shall not be disclosed except as permitted by the order or a subsequent order or as necessary for the enforcement of the custody order.

Source: UMCEA s. 6(6).

(6) The giving of information under subsections (1) or (3) shall be deemed for all purposes not to be a contravention of any Act or regulation or any common law rule of confidentiality.

Source: UCJEA s. 15(3).

Commentary: This section reproduces section 6 of the *Uniform Maintenance and Custody Enforcement Act*, with some modifications, to allow the Responsible Authority to demand, receive and provide information without court order, for the purpose of the enforcement of a custody order. Subsection 6(4) of the UMCEA has not been reproduced as clause (a) was considered unduly restrictive and clause (b) is already covered by the common law. Furthermore, it is recommended that subsection 6(4) be deleted from the existing UMCEA as a consequential amendment.

15. (1) Where, upon application to a court, it appears to the court that, for the purpose of the enforcement of a *custody or access order*, the applicant or person in whose favour the order is made has need to learn or confirm the *address, location or* whereabouts of the proposed respondent or person against whom the order is made, the court may order any person or public body, *including the Crown in right of (enacting jurisdiction)*, to provide the court with such particulars of the address, *location or whereabouts* of the proposed respondent or person against whom the order is made and the person or body shall give the court such particulars and the court may then give the particulars to such person or persons as the court considers appropriate.

Source: UCJEA s. 15(1).

Commentary: Changes were made to the existing subsection 15(1) of the UCJEA, particularly to cover the enforcement of rights of custody created by law. Clause

15(1)(a) was deleted as the proposed Uniform Act is limited to enforcement of orders. As well, minor wording changes have been made to the existing subsection.

(2) The giving of information in accordance with an order under subsection (1) shall be deemed for all purposes not to be a contravention of any Act or regulation or any common law rule of confidentiality.

Source: UCJEA s. 15(3).

Commentary: No change was made to the existing subsection 15(3) of the UCJEA.

16. (1) *A court* may *impose a* fine or imprisonment, or both, *for* any wilful contempt of *order* or resistance to its process or orders in respect of custody of *or access to* a child, but the fine shall not in any case exceed *$10,000*, nor shall the imprisonment exceed *six months*.

Source: UCJEA s. 16(1).

Commentary: In this subsection, the penalties have been increased to reflect the seriousness of the offence involved and to facilitate enforcement.

(2) An order for imprisonment under subsection (1) may be made conditional upon default in the performance of a condition set out in the order and may provide for the imprisonment to be served intermittently *where facilities are available*.

Source: UCJEA s. 16(2).

Commentary: Minor changes were made to the existing subsection 16(2) of the UCJEA.

17. No security shall be required to guarantee the payment of costs and expenses in the judicial proceedings related to any application made under this Act.

Source: New.

Commentary: This section states an exemption of providing security for costs. It was felt important that the applicants, who are often poor, not be prevented from taking judicial proceedings to find their children, for the sole reason that they did not have the means to provide security for costs.

Evidence

18. (1) Where a court is of the opinion that it is necessary to receive further evidence from a place outside (enacting jurisdiction) before making a decision the court may send to the *Responsible Authority (or similar authorities)* of the place outside (enacting jurisdiction) such material as may be necessary, *including certified copies of the original order, the identity of the respondent and a copy of the application*, together with a request,

(a) that the *Responsible Authority* take such action as may be necessary in order to require a named person to attend before the proper *court* in that place and produce or give evidence in respect of the subject-matter of the application; and

(b) that the *Responsible Authority* or the *extra-provincial court* send to the court a certified copy of the evidence produced or given before the *extra-provincial court*.

Source: UCJEA s. 13(1).

Commentary: Technical wording changes were made to the existing subsection 13(1) of the UCJEA and some details have been added concerning the material to be sent to the foreign Responsible Authority.

(2) A court that acts under subsection (1) may assess the cost of so acting against one or more of the parties to the application or may deal with such cost as costs in the cause.

Source: UCJEA s. 13(2).

Commentary: No change was made to the existing subsection 13(2) of the UCJEA.

19. (1) Where the *Responsible Authority* receives from an extra-provincial *court* a request similar to that referred to in *section 18* and such material as may be necessary, *including certified copies of the original order, the identity of the respondent and a copy of the application*, it is the duty of the *Responsible Authority* to refer the request and the material to the proper court.

Source: UCJEA s. 14(1).

Commentary: Technical wording changes and consequential

amendments were made to the existing subsection 14(1) of the UCJEA.

(2) A court to which a request is referred by the *Responsible Authority* under subsection (1) shall require the person named in the request to attend before the court and produce or give evidence in accordance with the request.

Source: UCJEA s. 14(2).

Commentary: Technical wording changes were made to the existing subsection 14(2) of the UCJEA.

20. A copy of an extra-provincial order certified as a true copy by a judge, other presiding officer or registrar of the *court* that made the order or by a person charged with keeping the orders of the *court* is prima facie evidence of the making of an order, the content of the order and the appointment and signature of the judge, presiding officer, registrar or other person.

Source: UCJEA s. 17.

21. For the purposes of an application under this Act, a court may take notice, without requiring formal proof, of the law of a jurisdiction outside (enacting jurisdiction) and of a decision of an extra-provincial *court*.

Source: UCJEA s. 18.

Commentary: Technical wording changes were made to the existing sections 17 and 18 of the UCJEA.

22. Any application submitted to the Responsible Authority of (enacting jurisdiction) or to the Responsible Authority of a province or territory of Canada or directly to the court of (enacting jurisdiction) or of a province or territory of Canada in accordance with the terms of this Act, together with documents and any other information appended thereto or provided by a Responsible Authority, shall be admissible in the court of (enacting jurisdiction).

Source: New.

Commentary: This section allows to the courts to take notice, without other formalities, of many relevant documents. However, it must not be construed to contain a rule on the evidential value which is to be placed on these documents.

23. Where there is a conflict between this Act and the (Act implementing the Hague Convention on the Civil Aspects of International Child Abduction), the latter prevails.

Source: New.

Commentary: This section aims to establish the preponderance of the Act implementing the Hague Convention on the Civil Aspects of International Child Abduction over this Act.

Consequential amendments to the Uniform Maintenance and Custody Enforcement Act

- delete subsection 6(4).
- delete references to custody enforcement.

*In all sections of the Draft Act, the words underlined have been added or replace other terms in corresponding sections of the actual UCJEA.

APPENDIX D

(See page 29)

DEFAMATION
REPORT OF THE SASKATCHEWAN COMMISSIONERS AND DRAFT ACT

TABLE OF CONTENTS

INTRODUCTION

At the 1987 meeting, the Conference instructed the Saskatchewan Commissioners to prepare a Draft Uniform Defamation Act and Commentary in English (Schedules A and B to this Report). The draft Act prepared in response to that resolution is essentially a revision of the draft prepared by the Saskatchewan Commissioners for the 1987 meeting, amended to reflect the resolutions adopted at that meeting.

The new Uniform Defamation Act will replace the Uniform Defamation Act, 1962. The old UDA was based on existing provincial legislation, which in turn was drawn largely from nineteenth-century English legislation.

The Saskatchewan commissioners presented a report on defamation at the 1982 and 1983 meetings of the Conference. The report recommended comprehensive revision of the Uniform Defamation Act in order to "keep pace with this large and complex area of law", and to ensure that an acceptable balance between freedom of expression and protection of individual reputation continues to be reflected in the law, particularly in the era of the Charter of Rights and Freedoms. Many of the recommendations in the report were based on recent proposals for reform of defamation law in other Commonwealth jurisdictions, including the Faulk's Committee Report (1975) in England.

The recommendations in the 1983 report that have been included (in some cases with modification) in the draft Act were approved at the 1983 and 1987 meetings of Conference. Some additional provisions in

the draft Act were carried over from the UDA, 1962 without change in substance. The principles contained in the new provisions are discussed in detail in the 1983 report, to which reference should be made as a supplement to the Commentary.

The following general features of the proposed Act should be noted:

(1) Modernization of the law. For Example, "broadcasting" has been redefined to include the full range of modern methods of communication, and procedure has been modernized (e.g. abolition of the "rolled-up plea").

(2) Codification and extension of the common law defences. Because of increasing concern about the possible misuse of defamation actions, and in order to ensure compliance with the Charter of Rights and Freedoms, traditional defences such as "justification" and "fair comment" have been codified. The codification drew upon the recommendations of the Faulk's Committee, and is intended to both clarify and to remove certain technical impediments. In addition, certain new defences have been created. For example, the "innocent defamer" who makes a reasonable offer of amends that is rejected can put forward the offer as a defence.

(3) The tort of defamation has been extended to encompass actions for defamation of deceased persons.

(4) Removal of subject matter that is not appropriate in defamation legislation. Provisions relating to limitation of actions, survival of actions, and venue do not appear in the draft. Those matters are best left to other Uniform Acts, or general provincial law.

It should be noted that the new draft includes one matter that has not been discussed by the Conference, and that was not included in the 1983 report. Section 16 of the UDA, 1962 makes provision for the "place of trial" of defamation actions. This provision appears to have been carried over from provincial legislation that was adopted before judicature legislation dealt with venue in a comprehensive fashion. Such a provision is no longer required in the defamation legislation of any province.

It should also be noted that the 1983 report and the draft Act presented to the conference in 1987 contained a definition of "defamatory matter" that was intended to codify the common law definition of defamation. Although that recommendation was approved by the Conference in 1983, the decision was reconsidered in 1987.

FURTHER CONSIDERATIONS

Although a *Draft Uniform Defamation Act* has now been prepared according to the Conference's instructions, the Saskatchewan Commissioners are of the opinion that the Conference can not avoid some additional consideration of defamation law. Since the 1987 meeting, several widely publicized defamation actions have given rise to increasing concern in the media about a so-called "libel chill". For example, in a *Globe and Mail* article ("Challenging Canada's Libel Law", March 7, 1988), concern was expressed about "the chilling winds of apprehension that keep many news stories from reaching the public". It was suggested that there is a new and troubling attitude toward defamation actions:

> Libel suits provide a bargain basement method of silencing press critics. "You can have Canada's finest libel counsel listen to you and produce the notice – and probably a statement of claim – for less than $2,000.00 . . . then the defendant has to do a whole bloody defence. That can be phenomenally expensive. Nobody is afraid of losing. They're afraid of getting caught up in an action."

Media critics suggest that the libel law has features which encourage its use in this way. They point to the American experience, where special defences have been afforded to reports and comment upon the activities of public figures.

The proposed *Uniform Defamation Act* may already meet some of these criticisms. For example:

(1) Section 12 of *The Draft Act* clarifies the law in regard to apology as mitigation of damages, and removes a provision of the U.D.A., 1962 that may have made it more difficult to mitigate on the basis of apology than at common law.

(2) Section 13 of *The Draft Act* introduces a new defence of "offer of amends" available to the "innocent defamer" who has inadvertently published defamatory material.

(3) Section 14 of *The Draft Act* extends the defence of justification. At common law, the defendant was required to justify only that part of the publication put in issue by the plaintiff. Under the new provision, the defendant may make reference to the whole of the published matter in order to demonstrate that publication was justified.

(4) Section 15 of *The Draft Act* codifies and clarifies the defence of fair comment.

(5) Section 15(2) has been redrawn to make it easier for a defendant to set up a defence in regard to publication of an opinion expressed by another.

(6) Sections 16 and 17 of *The Draft Act* extend the privilege attaching to reports of public proceedings, both by extending the list of proceedings to which the privilege applies, and by providing additional protection to broadcasts of proceedings of Parliament and legislatures.

(7) Certain protections (e.g. s. 18 of *The Draft Act*) formerly available only to broadcasters and newspapers have been extended to everyone, including the publishers of periodicals that do not qualify as "newspapers".

But the proposals outlined above do not include the principal reform advocated by the critics. It is suggested that there is a *de facto* reverse onus in libel actions directed at the media. In many cases, the statement complained of is *prima facie* defamatory, at which point the evidentiary burden falls upon the defendant either to prove the truth of the statement, or to demonstrate those matters required to establish a defence of justification or fair comment. In the United States, greater protection is afforded to the media:

> The United States Supreme Court has established the rule ... that the guarantee of freedom of speech and of press contained the First Amendment limits the power of a court, in a civil action by a public official for criticism of his public conduct, to awarding damages only if comments or criticisms were made with actual malice which is defined as knowledge that the statement was false, or a reckless disregard as to whether or not it was false (50 Am. Jr. 816).

This rule effectively places the evidentiary burden on the plaintiff to demonstrate malice.

Whether such an approach will find favor under *The Charter of Rights and Freedoms* must await further consideration of the issue by the courts. However, the Conference might consider if it would be desirable to create such a general defence by statute.

There are some other aspects of the proposed *Draft Act* which should be reconsidered in light of concern about the alleged "libel chill". In particular, two topics might be reconsidered:

Defamation of the Dead:

Extension of the tort of defamation to cover defamation of deceased

persons was approved in principle at the 1983 meeting. In 1987, it was further resolved that no substantial limitation should be placed on the scope of such an action, either by imposing a special limitation period, or by limiting remedies to exclude damages. There was, however, a strongly-expressed minority point of view. It was suggested, for example, that "the potential for nuisance actions is considerable. Society's interest in free speech is so much stronger that society's interest in the reputation of the dead that we should dispose of the whole matter by dropping it", that "the potential of these things getting into court is going to discourage a lot of people who may otherwise undertake and do perfectly reasonable things", and "to cause a court to be in a position of having to make historical judgments is unrealistic and impractical".

Concern has been expressed in particular about the possibility that apprehension of defamation actions might place an unwarranted damper on academic historical research. On the other hand, the principle evil that an action for defamation of the dead appears to be directed at is the reputation of the recently-dead celebrity. Ironically, the kind of yellow-press journalist who presently capitalizes on the reputation of celebrities who can no longer defend themselves would probably be less deterred by fear of a defamation action than the legitimate historian who often stands to gain little financially from publication.

The Conference might reconsider imposing a limitation period running from the date of death of the person defamed. It should be noted that archival materials necessary to serious historical research are usually not opened for some twenty years after the death of the person depositing them.

A Right of Reply:

The 1983 report recommended that a right of reply be provided as a remedy for defamation in certain circumstances. This recommendation was not discussed at either the 1983 or 1987 meeting. A court-ordered right of reply would be an alternative to damages in appropriate cases, whether the right was expressed as being available in lieu of or in addition to damages. Professor Fleming has suggested that the right of reply is "a significantly better solution to the conflict between freedom of speech and protection of reputation than the traditional opportunity of either granting or altogether denying an awared of damages". Fleming suggests that a right of reply would be preferable to damages in cases such as these:

(a) In lieu of damages for honest comment on matters of public interest where the defence of fair comment fails (i.e., comment not based on true facts but the defendant has an honest belief);

(b) Where the defendant on reasonable grounds and after making all inquiries reasonably open to him in the circumstances in fact believed the truth of all statements of fact contained in the matter published.

The Conference might consider adoption of a broad provision permitting the court to order that the plaintiff be given a right of reply as a substitute in whole or in part for damages.

APPENDIX D

SCHEDULE A

DRAFT UNIFORM DEFAMATION ACT (1988)

1. In this Act

Interpretation "broadcasting"

(a) "broadcasting" means the dissemination of writing, signs, signals, pictures, sounds and intelligence of all kinds, intended to be received by the public directly or through the medium of relay stations

(i) by means of any device which uses Hertzian waves propogated in space,

(ii) by means of cables, wires, fibre-optic linkages or laser beams,

(iii) through a community antenna television system operated by a person licensed under the *Broadcasting Act* (Canada) to carry on a broadcasting receiving undertaking, or

(iv) by means of an amplifier or loudspeaker of a tape recording or other recording,

and "broadcast" has a corresponding meaning;

(b) "defamation" means libel or slander; *"defamation"*

(c) "newspaper" means a paper that *"newspaper"*

(i) contains news, intelligence, occurrences, pictures or illustrations or remarks or observations thereon,

(ii) is printed for sale, and

(iii) is published periodically, or in parts or numbers, at intervals not exceeding 31 days between the publication of any two of such papers, parts or numbers;

(d) "public meeting" means a meeting lawfully held in good faith for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether admission to the meeting is general or restricted. *"public meeting"*

Damage presumed

2. An action lies for defamation and, in an action for defamation where defamation is proved, damage will be presumed.

Defamation of deceased

3.-(1) Where a person publishes matter in relation to a deceased person which would have constituted defamation had the deceased been alive, an interested person may, with leave of the court, bring an action for defamation against the publisher of the alleged defamatory matter.

Interested person

(2) For the purposes of this section, an interested person is a person who, in the opinion of the court

(a) has sufficient connection by way of a blood, business, professional or other relationship with the deceased person to bring an action in defamation with respect to the publication of alleged defamatory matter about the deceased person, and

(b) is motivated primarily, in bringing the action, by a concern about the attack on the reputation of the deceased person.

Allegations of plaintiff

4. In an action for defamation, the plaintiff may allege that the matter complained of was used in a defamatory sense, specifying the defamatory sense without alleging how the matter was used in that sense, and the pleading shall be put in issue by the denial of the alleged defamation and, where the matters set forth, with or without the alleged meaning, show a cause of action, the pleading is sufficient.

Legal innuendo

5. A claim in defamation based on a single publication and relying both on the natural and ordinary meaning of words and on a legal innuendo shall constitute a single cause of action.

Rolled-up plea abolished

6. In an action for defamation, each defence relied on shall be expressly pleaded, and the plea known as the rolled-up plea is herby abolished.

Payment into court by way of amends

7. The defendant may pay into court with his defence a sum of money by way of amends for the injury sustained by the publication of the defamatory mat-

ter, with or without a denial of liability, and the payment has the same effect as payment into court in other cases.

General or special verdict

8. On the trial of an action for defamation

(a) the jury may give a general verdict on the whole matter in issue in the action, and shall not be required or directed to find for the plaintiff merely on proof of publication by the defendant of the alleged defamation and of the sense ascribed to it in the action,

(b) the court shall, according to its discretion, give its opinion and directions to the jury on the matter in issue as in other cases, and

(c) the jury may find a special verdict on the issue, if it thinks fit to do so,

and the proceedings after verdict, whether general or special, shall be the same as in other cases.

Consolidation of actions for same defamation

9. On an application by two or more defendants in two or more actions brought by the same person for the same or substantially the same defamation, the court may make an order for the consolidation of the actions so that they will be tried together and, after an order has been made and before the trial of the action, the defendants in any new action instituted in respect of any such defamation are also entitled to be joined in a common action on a joint application by the new defendants and the defendants in the action already consolidated.

Assessment of damages and apportionment of damages and costs in consolidated action

10.-(1) In a consolidated action under section 10, the court or jury shall assess the whole amount of the damages, if any, in one sum, but a separate verdict shall be given for or against each defendant in the same way as if the actions consolidated had been tried separately.

Idem

(2) If the court or jury gives a verdict against defendants in more than one of the actions so consolidated, it shall apportion the amount of the damages between and against those defendants and, if the plaintiff is

awarded the costs of the action, the judge shall make any order that he considers just for the apportionment of the costs between and against those defendants.

Other damages, compensation

11. In an action for defamation, the defendant may plead or adduce evidence in mitigation of damages that the plaintiff has already recovered damages in an action or received or agreed to receive compensation in respect of the same defamation or a substantially similar defamation.

Apology

12.-(1) In an action for defamation, the defendant may plead or adduce evidence in mitigation of damages that he made or offered to make an apology or retraction at a time and in a manner that was adequate or reasonable in the circumstances.

Idem

(2) In an action for defamation, the plaintiff may plead or adduce evidence in aggravation of damages that the defendant refused or failed to make an apology or retraction at a time and in a manner that was adequate or reasonable in the circumstances.

Unintentional defamation

13.-(1) A person who claims that alleged defamatory matter was published by him innocently may make an offer of amends to the aggrieved person pursuant to this section.

Offer of amends

(2) An offer of amends pursuant to this section shall

(a) be in writing,

(b) be expressed to be made for the purposes of this section,

(c) include a statement of explanation setting out the facts relied on to show that the words complained of were published innocently in relation to the aggrieved person,

(d) be made as soon as practicable after the publisher receives notice that the matter is or might be defamatory of the aggrieved person, and

(e) include an offer to publish, or join in the publication of, a suitable correction of the alleged defamatory matter and a sufficient apology.

(3) If an offer of amends is accepted by the aggrieved person and is duly performed, no action for defamation shall be taken or continued by that person against the publisher in respect of the publication of the alleged defamatory matter in question, but this subsection does not prejudice any cause of action against any other person jointly responsible for the publication of that alleged defamatory matter. *Where offer accepted*

(4) If an offer of amends is not accepted by the aggrieved person, it shall be a defence, in any action for defamation by him against the publisher in respect of the publication in question, to allege and prove *Where offer not accepted*

(a) facts and circumstances which establish that the alleged defamatory matter was published innocently in relation to the plaintiff,

(b) that the offer of amends fulfilled the requirements of subsection (2), and

(c) that the offer has not been withdrawn,

but, for the purposes of such a defence, no evidence, other than evidence of the facts set out in the statement of explanation mentioned in clause (2)(c), is admissible on behalf of the defendant to prove that the words were published innocently in relation to the plaintiff unless the court directs otherwise.

(5) For the purposes of this section, alleged defamatory matter shall be treated as published by the publisher innocently in relation to the aggrieved person if the publisher exercised all reasonable care in relation to the publication, and *Innocent publication*

(a) the publisher did not intend to publish the alleged defamatory matter of and concerning the aggrieved person, and did not know of circumstances by virtue of which it might be understood to refer to him, or

(b) the matter was not defamatory on the face of it, and the publisher did not know of circumstances by virtue of which it might be understood to be defamatory of the aggrieved person.

Agents, etc

(6) Any reference in subsection (5) to the publisher shall be construed as including a reference to any servant or agent of the publisher who was concerned with the contents of the publication.

Power of court

(7) Where an offer of amends is accepted by the aggrieved person, a judge may, in default of agreement between the parties and on application by one of them

(a) determine the form or manner of publication of the correction or apology, and the judge's decision is final,

(b) order the publisher to pay the costs of the aggrieved person on a solicitor-client basis and any expenses reasonably incurred by that person as a result of the publication in question,

(c) where there are unsold copies of the published matter in question, make any order that he considers appropriate, including an order

(i) permitting the continuation or resumption of the distribution of those copies unamended,

(ii) requiring the inclusion in those copies of a correction of the words complained of that is adequate or reasonable in the circumstances,

(iii) prohibiting the continuation or resumption of the distribution of those copies.

(8) An offer of amends which is not accepted by the aggrieved person shall not be construed as an admission of liability on the part of the publisher and shall not, without the consent of the publisher, be referred to in an action for defamation brought against him in respect of the publication in question.

Defence of justification

14. Where an action for defamation has been brought in respect of the whole or any part of alleged defamatory matter, the defendant may allege and prove the truth of any part of such matter, and the defence of justification shall be held to be established if the

alleged defamatory matter, taken as a whole, does not materially injure the plaintiff's reputation having regard to any part which is proved to be true.

Fair comment

15.-(1) In an action for defamation, the defence of fair comment may be raised where the alleged defamatory matter is a statement of opinion on a matter of public interest, and the statement of opinion is

(a) grounded on a substantial basis of fact,

(b) one which a normal, albeit biased person, might hold concerning those facts, and

(c) honestly held by the person making the statement,

but the defence is defeated where the plaintiff establishes that the defendant published the defamatory matter for malicious purposes.

Publication of opinion of another

(2) Where the defendant published defamatory matter that is an opinion expressed by another person, a defence of fair comment by the defendant shall not fail for the reason only that the defendant or the person who expressed the opinion, or both, did not hold the opinion if a person could honestly hold the opinion.

Fair comment, factual

(3) In an action for defamation in respect of words including or consisting of an expression of opinion, a defence of fair comment is not defeated by reason only that the defendant has failed to prove the truth of every relevant assertion of fact relied on by him as a foundation for the opinion, if the assertions that are proved to be true are relevant and afford a foundation for the opinion.

Broadcasts of Parliament, Assemblies

16. Where a broadcast is made primarily to communicate to the public the proceedings of the Parliament of Canada or of the Assembly of any province of Canada, the absolute privilege that attaches to those proceedings attaches to the broadcast of those proceedings.

Reports of public proceedings

17.-(1) A fair and accurate report of proceedings that are open to the public or to a reporter of any of

(a) the Senate or House of Commons of Canada,

(b) the Legislative Assembly of this province or any other province of Canada,

(c) a committee of a body mentioned in clause (a) or (b),

(d) any commission of inquiry authorized to act by or pursuant to statute or other lawful warrant or authority,

(e) any tribunal, board, committee or body formed or constituted under and exercising functions under any public act of Parliament or of a Legislature in Canada,

(f) any municipal council, school board, board of education, board of health or any other board or local authority constituted under any act of Parliament or of a Legislature in Canada or of a committee of any such council, board or local authority,

is privileged unless it is proved that the publication is made maliciously.

(2) A fair and accurate report of the findings or decisions of an association or any committee or governing body of an association relating to a person who is a member of or subject, by virtue of any contract, to the control of that association is privileged, unless it is proved that the publication was made maliciously.

(3) For the purposes of subsection (2), "association" means an association that is formed in Canada by or pursuant to an Act of Parliament or of a Legislature in Canada or otherwise

(a) for the purpose of promoting or safeguarding the interests of any game, sport or pastime, to the playing or exercise of which members of the public are invited or admitted, and that is empowered by its constitution to exercise control over or adjudicate on the actions or conduct of persons connected with or taking part in the game, sport or pastime,

(b) for the purpose of

(i) promoting or encouraging the exercise of, or interest in, any art, science, religion or learning, or

(ii) promoting a charitable object or other objects beneficial to the community,

and that is empowered by its constitution to exercise control over or to adjudicate on matters of interest or concern to the association or on the actions or conduct of any persons subject to that control or adjudication.

(4) A fair and accurate report of the findings or decisions of a professional body, or any committee or governing body of a professional body, that is empowered by its constitution to exercise control over or to adjudicate on matters of interest or concern to the professional body or on the actions or conduct of any persons subject to that control or adjudication, relating to a person who is a member of or subject, by virtue of any contract, to the control of that professional body, is privileged unless it is proved that the publication was made maliciously.

(5) A fair and accurate report of:

(a) any public meeting, held in Canada,

(b) any press conference held in Canada convened to inform the press or other media of a matter of public concern,

(c) any documents circulated at a public meeting or press conference described in clause (a) or (b) to persons lawfully admitted thereto,

is privileged, unless it is proved that the publication was made maliciously.

(6) A copy or a fair and accurate report or summary of any report, bulletin, notice or other document issued for the information of the public by or on behalf of any government department, bureau, office or public officer is privileged unless it is proved that the publication was made maliciously.

(7) In an action for defamation in respect of the publication of a report of a matter in circumstances described in this section, the provisions of this section shall not be a defence if it is proved that:

(a) the plaintiff has asked the defendant to publish at the defendant's expense and in a manner that is adequate or reasonable in the circumstances a letter or statement of explanation or contradiction, and

(b) the defendant has refused or neglected to do so or has done so in a manner that is not adequate or not reasonable in the circumstances.

(8) Nothing in this section applies to the publication of seditious, blasphemous or indecent matter.

(9) Nothing in this section limits or abridges any privilege now by law existing, or applies to the publication of any matter

(a) that is not a public concern, or

(b) the publication of which is not for the public benefit.

Reports of proceedings in court privileged

18.-(1) A fair and accurate report of proceedings publicly heard before any court is absolutely privileged if the report

(a) contains no comment,

(b) is published contemporaneously with the proceedings that are the subject matter of the report, or within 30 days thereafter, and

(c) contains nothing of a seditious, blasphemous or indecent nature.

Where defence not available

(2) In an application for defamation in respect of the publication of a report or other matter in circumstances mentioned in subsection (1), the provisions of this section shall not be a defence if it is proved that:

(a) the plaintiff has asked the defendant to publish at the defendant's expense and in a manner that is adequate or reasonable in the circumstances a

reasonable letter or statement of explanation or contradiction, and

(b) the defendant has refused or neglected to do so or has done so in a manner that is not adequate or not reasonable in the circumstances.

Headlines and captions

19. Sections 18 and 19 apply to every headline or caption that relates to a report contained in a newspaper or other publication.

Where plaintiff to recover special damages only

20.-(1) The plaintiff shall recover only special damages if it appears on the trial that

(a) the alleged defamatory matter was published in good faith,

(b) there was reasonable ground to believe that the publication of the alleged defamatory matter was for the public benefit,

(c) the alleged defamatory matter did not impute to the plaintiff the commission of a criminal offence,

(d) the publication took place in mistake or misapprehension of the facts, and

(e) either

(i) where the alleged defamatory matter was published in a newspaper, a full and fair retraction of and a full apology for any statement therein alleged to be erroneous were published in the newspaper within a reasonable time and were so published in as conspicuous a place and type as was the alleged defamatory matter, or

(ii) where the alleged defamatory matter was broadcast, a retraction and apology were broadcast from broadcasting stations from which the alleged defamatory matter was broadcast within a reasonable time and on at least two occasions on different days and at the same time of day as the alleged defamatory matter was broadcast or as near as possible to that time.

Non-application of subsection (1)

(2) Subsection (1) does not apply in the case of defamation against any candidate for public office unless the retraction and apology are

(a) made editorially in the newspaper in a conspicuous manner, or

(b) broadcast,

at least five days before the election, as the case may require.

Application of section 20

21.-(1) Section 20 applies only to actions for defamation against

(a) the proprietor or publisher of a newspaper,

(b) the owner or operator of a broadcasting station, or

(c) an officer, servant or employee of a person mentioned in clause (a) or (b),

in respect of defamatory matter published in the newspaper or from the broadcasting station.

(2) No defendant in an action for defamation published in a newspaper is entitled to the benefit of section 20 unless the name of the proprietor and publisher and address of publication are stated in a conspicuous place in the newspaper.

(3) No defendant in an action for defamation published by broadcasting is entitled to the benefit of section 20 if he fails, within 10 days of the receipt by the broadcasting station of a registered letter from a person

(a) containing the person's return address,

(b) alleging that defamation against the person has been broadcast from the station, and

(c) requesting the name and address of the owner or operator of the station, or the names and addresses of the owner and the operator of the station,

to deliver or send by registered mail to that person the requested information.

(4) The production of a printed copy of a newspaper is *prima facie* evidence of the publication of the printed copy, and of the truth of the information mentioned in subsection (2). *Printed copy newspaper*

General Notes

1. The general limitation period for defamation actions is to be found in the *Uniform Limitation of Actions Act*.

2. The general provisions pertaining to defamation survivability are to be found in the *Uniform Survival of Actions Act*.

3. Place of trial of defamation actions should be determined by provincial judicature legislation.

APPENDIX D

SCHEDULE B

COMMENTARY

Section 1(a)	As passed at the 1983 meeting. It expands the definition of "broadcasting" in the UDA, 1962 to include forms of communication other than radio waves.
Section 1(b)-(d)	See Section 1, UDA, 1962.
Section 2	This is Section 2 of the UDA, 1962.
Section 3	The UDA, 1962, like the common law, made no provision for defamation of the dead. This section was adopted in principle at the 1983 meeting. The final draft incorporates the suggestions made at the 1987 meeting, namely: that the ordinary remedies be available with respect to an action for defamation of the dead, and that other than the restriction set out in subsection (2), no further limit be placed on such actions.
Section 4	This is Section 3 of the UDA, 1962.
Section 5	As passed at the 1983 meeting. This reverses the common law in part, under which a suit based on both ordinary meaning and so-called "true innuendo" was technically two separate causes of action.
Section 6	As passed at the 1983 meeting. This abolishes the misnamed "rolled-up" plea, a source of confusion in the past.
Section 7	This is Section 5 of the UDA, 1962.
Section 8	This is Section 6 of the UDA, 1962.
Section 9	This is Section 7 of the UDA, 1962.
Section 10	This is Section 8 of the UDA, 1962.
Section 11	This is Section 17(2) of the UDA, 1962, redrawn in more concise form.
Section 12	As passed at the 1987 meeting. This section replaces Sections 4 and 17(1) of the UDA, 1962. Section 17(1) of the UDA applied only to newspapers or broadcasters, and may have been narrower in scope than the common law in regard to apology as mitigation of damages. The new section simplifies the law, and essentially restores the common law.

Section 13	The policy embodied in this provision was approved at the 1983 meeting. It permits the "innocent" or unintentional defamer (as defined) to make an "offer of amends", which may operate as a defence if not accepted. Compare to the N.S. Defamation Act, Section 15. In 1987 the provision approved in 1983 was amended deleting protection for "open-line" broadcasts.
Section 14	As passed at the 1983 meeting. It is a partial codification and extension of the common law defence of justification. Under this section, justification may be based on the whole of the publication in question, not (as at common law) just the portion alleged to be defamatory by the plaintiff.
Section 15(1)	As passed at the 1983 meeting and approved with minor changes at the 1987 meeting. The section codifies the defence of fair comment. Note that it differs from the proposal approved in substance in 1983 by replacing the phrase "honesty and genuinely" with the word "honesty" alone.
Section 15(2)	As passed at the 1987 meeting. This subsection has been redrawn to duplicate the wording of the Ontario Defamation Act. It replaces Section 9 of the UDA, 1962 (as amended 1979).
Section 15(3)	As passed at the 1983 meeting. Compare the Ontario Defamation Act, Section 24, and the Nova Scotia Defamation Act, Section 9.
Section 16	As passed at the 1983 meeting. The section is primarily intended to protect broadcasters of proceedings of Parliament and legislatures. It provides broader protection than Section 17 (below) in this special case.
Section 17	This is Section 10 of the UDA, 1962, amended to extend the statutory privilege to all publishers, not just newspapers or broadcasters, and to extend to reports of proceedings of other bodies than those listed in UDA, 1962. The 1987 meeting directed that the list include only Canadian bodies.
Section 18	This is Section 11 of the UDA, 1962, amended to extend the statutory privilege to all reports, not just

those of newspapers or broadcasters (as passed at the 1983 meeting).

Section 19 — This is Section 12 of the UDA, 1962.

Section 20 — This is Section 18 of the UDA, 1962, including amendments consequential upon the repeal of the notice of action provision (UDA, 1962, Section 14), as passed at 1987 meeting.

Section 21 — This is Section 19 and 20 of the UDA, 1962, redrawn in a more concise form, as amended and passed at the 1987 meeting.

Comment on General Notes

1. UDA, Section 15, "limitation of actions" has not been incorporated in the new Act. Limitation periods should, in principle, all be contained in limitation statutes. This policy was approved at the 1987 meeting.

2. The 1983 meeting concluded that provision for "defamation survivability" be made. The proper place for such a provision is in survival of actions legislation, and the USAA includes appropriate provisions for application to defamation.

3. Provincial judicature legislation now comprehensively regulates question of venue, making UDA, 1962, Section 16 unnecessary.

SCHEDULE C

TABLE OF CONCORDANCE

Schedule G* Draft Defamation Act (1987)	Draft Defamation Act (1988)
s. 1(c)	deleted (see s. 1)
s. 3(1)	altered (see s. 3(1))
s. 8	deleted
s. 14(5)(c)	deleted (see s. 13)
s. 16 (2)	new provision substituted (see s. 15(2))
s. 18	new provision substituted (see s. 17)

*This can be found in the 1987 Proceedings of the Uniform Law Conference at pages 182 to 195.

APPENDIX E

(See page 29)

INTERIM REPORT ON EXTRA-PROVINCIAL CHILD WELFARE ORDERS

At the Uniform Law Conference held in 1982 a report on Extra-Provincial Child Welfare Orders was discussed. The report was agreed to and a draft Uniform Act was to be prepared for the next meeting. Unfortunately the Uniform Act was not prepared and the matter was dropped from the Conference's agenda.

In 1987 the Alberta Commissioners requested that the matter be placed back on the agenda so that a draft Uniform Act could be dealt with at this year's meeting.

In reviewing the report prepared in 1982 a number of questions were raised relating to the "proposed solution" as outlined in the 1982 report.

The Alberta Commissioners wish to table this the attached so that it can be circulated to the various government departments that deal with child welfare matters for their review and comments.

The Alberta Commissioners will provide a further report with a draft Act and commentaries at the Conference's next meeting.

Legislation is required to ensure the recognition by one province of a child welfare order granted in another and in addition to allow for the delegation by a child welfare authority of any powers and duties conferred on it pursuant to a child welfare order to a child welfare authority in another jurisdiction.

The 1982 report suggested that the recognition of child welfare orders is much the same as other custody orders. It is on that basis that the matter of recognition of child welfare orders should be dealt with under general custody enforcement legislation instead of being dealt with specifically in this Uniform Act. They should be treated the same as any other custody order.

It is therefore proposed that this uniform legislation need only deal with the issue of the delegation of "child welfare orders and agreements".

Attached is a proposed Uniform Inter-Jurisdictional Child Welfare Orders Act that would allow a child welfare authority to delegate any power or duty conferred or imposed on it to a child welfare authority in another jurisdiction.

APPENDIX E

UNIFORM INTER-JURISDICTIONAL CHILD WELFARE ORDERS ACT

Definitions

1 In this Act,

"child welfare order or agreement" means

(a) an order of a court whereby a child welfare authority is granted permanent or temporary custody or guarianship of a child, or

(b) an agreement whereby a child welfare authority is given permanent or temporary custody or guardianship of a child;

"Director" means (jurisdictions should set out the appropriate title of the person under their child welfare legislation).

Delegation

2(1) The Director may, with respect to a child who is the subject of an (**order or agreement), delegate to a proper authority in another province of territory of Canada any power or duty conferred or imposed on the Director under the (**order or agreement), but the custody of or guardianship for the child, as the case may be, remains vested in the Director.

(2) Where a proper authority in another province or territory of Canada delegates a power or duty conferred or imposed on it under a child welfare order or agreement made in that province or territory, the Director may, to the extent that the power or duty is consistent with (the Child Welfare Act*), exercise that power or duty, but the custody of or guardianship for the child, as the case may be, remains vested in the proper authority.

(*jurisdictions should insert the name of the appropriate Act or Acts that deal with child welfare orders and agreements)

(**Jurisdictions should make reference to the appropriate name of the order or agreement made pursuant to their child welfare legislation)

APPENDIX F

(See page 44)

REVIEW OF FINANCIAL SITUATION OF UNIFORM LAW CONFERENCE

BACKGROUND

As Treasurer, I was asked by the Executive to review the Conference's financial situation and the contributions that are made by the governments. I asked Mr. Basil Stapleton to assist me.

EXPENDITURES

In reviewing our expenditures over the past number of years, we estimate our expenditures for 1988-89 to be as follows:

1. Printing and Distribution of Proceedings	$25,000
2. Secretarial Services	3,500
3. National Conference of Commissioners on Uniform State Laws	3,000
4. Executive Travel	2,500
5. U.L.C. Annual Meeting	10,000
6. Professional Fees	700
7. Postage	800
8. Stationery	500
9. Telephone	1,500
10. Honorarium (Executive Director)	21,000
TOTAL	$68,500

1 - This item varies year by year depending on the size of the publication. The costs of printing the Uniform Acts as separate pamphlets has not been included.

2 - This item seems to vary between $3,000 and $4,000. It includes typing services provided to the Executive Director.

3 - This item has fluctuated over the years. In some cases the ULC has paid all the expenses of the President attending the National Conference of Commissioners on Uniform State Laws and in other cases the government of the President has paid some or all of the expenses.

4 - This item reflects the travel costs incurred by the Executive Director in attending the Conference and in attending other Conference related meetings. It also covers the travel costs of members of the Executive who are not government employees when travelling on Conference related matters other than travelling to the Conference itself.

5 - This item reflects the cost of the translation services for the Uniform Section and the Drafting Section and of Secretarial services and other costs related to the annual meeting that are not paid for by the host Province. Currently we pay only a portion of the translation costs.

6 - This item covers the Auditors' fees.

7 - This item covers the cost of sending ULC materials to local secretaries and the sending of other ULC correspondence.

8 - This item includes the cost of new stationery when there are changes to the Executive.

9 - This item covers long distance telephone charges. Most Executive meetings are held by telephone conference calls.

10 - This item covers the Executive Director's honorarium.

REVENUE

Assuming that all jurisdictions pay the new assessments our revenue for 1988-89 is $69,000. However we have already expended about $10,000 of 1988-89 revenue to pay for 1987-88 expenses.

CONCLUSION

As can readily be seen our assessments would not quite cover our expenditures, not taking into account the $10,000 we have already spent. It must be noted that the expenditures are only estimates. The cost of printing the Proceedings could be less depending on the size of the Proceedings and over the past few years the expenses for the National Conference on Uniform State Laws have not been significant as the President expensed most of that travel through his own government's travel budget.

In future, the only area where there might be an expense that we may not be able to absorb will be for the costs of translation and secretarial services. Presently we pay about half the costs. The other half is paid by the Canadian Intergovernmental Conference Secretariat to provide secretarial and translation services for the Opening and Closing Plenary Sessions and the Criminal Law Section. It is possible that we will become responsible to pay all the costs.

It is our view that the current assessments will be adequate for the next number of years, if the following recommendations are accepted, in particular recommendation number 1. In fact, there may be sufficient funds to also absorb the full costs of translation and secretarial services

should that occur in the future. Also if recommendation number 1 is adopted the $10,000 overrun would be covered.

RECOMMENDATIONS

1. We have been advised by the Justice Department that the cost of printing the research papers in our proceedings can be reimbursed through the Research Fund. This could save the Conference about 1/2 the cost of printing the Proceedings. The Committee recommends (a) that the Research Fund be used to pay part of our printing costs and (b) that the Proceedings be reviewed in order to eliminate any unnecessary insertions and to determine any other cost-cutting measures.
2. It is our recommendation that a policy be adopted by which the honorarium would be capped at a maximum of $25,000 and be subject to review and adjustment from time to time.
3. We recommend that other sources of revenue such as the law foundations be explored.
4. We recommend that a budget be prepared each year by the Executive and approved by the Conference at its Closing Plenary Session and that the Executive establish guidelines relating to the expenditure of ULC money.

Peter J. Pagano
Basil Stapleton

APPENDIX G

(See page 29)

PERMANENT EDITING COMMITTEE REPORT

The Proceedings of the 1987 meeting of the Conference (p. 27) mention that the *Permanent Editing Committee* would be chaired by a delegate from New Brunswick for the year 1987-88.

During that same year of 1987-88, another Committee was struck to revise the drafting conventions of the Conference and to prepare English and French conventions (Proceedings of 1987 p. 22). During this year it could not be completed.

Since the *Permanent Editing Committee* was to work and proceed with the new conventions, the Committee will proceed with its work when the new conventions are prepared and approved.

I move that the *Permanent Editing Committee* be chaired by a delegate from New Brunswick for the year 1988-89.

Bruno Lalonde
Chairman
Permanent Editing Committee

APPENDIX H

(See page 30)

UNIFORM INTERNATIONAL TRUSTS ACT

Article 24 of the Hague Convention on Trusts states as follows:

> 24 A State within which different territorial units have their own rules of law in respect of trusts is not bound to apply the Convention to conflicts solely between the laws of such units.

In effect it is saying that the Convention does not have to be applied if the choice of law is limited to Canadian Provinces.

Although it is arguable that the enactment by a province or territory of the Uniform Conflict of Laws Rules for Trusts Act would be construed by the Courts as evidence of that jurisdiction's decision "not to apply the Convention to conflicts solely between the laws of such units", it may be advisable, particularly where a jurisdiction enacts the Uniform International Trusts Act but not the Uniform Conflict of Laws Rules for Trusts Act, that the Uniform International Trusts Act includes the following provision:

> This Act does not apply to conflicts solely between the laws of the provinces and territories of Canada.

APPENDIX I

(See page 30)

The *Law Reform Conference of Canada* held its Fourth Annual meeting on Sunday, August 7th at the King Edward Hotel in Toronto.

Eighteen persons representing all of the 13 jurisdictions in Canada except for Prince Edward Island made this meeting the best attended so far. The Law Reform Conference of Canada was organized in 1985 at Halifax, NS. The Presidents and locations of meetings since then have been as follows:

1985-86	Clifford Edwards, QC	Winnipeg, Man
1986-87	Arthur Close	Victoria, BC
1987-88	James R. Breithaupt, QC	Toronto, Ont

A report on the current status of staff, finances and projects was made by each jurisdiction. The highlight of the sequence of reports was the announcement of the revival of the Law Reform Commission of Manitoba by the newly-elected provincial government. The former Chairman and three former commissioners – a judge, an academic and a practitioner – were re-appointed. The former Lieutenant-Governor was appointed as the lay commissioner. Staff, resources and projects are all greatly improved and prospects are bright.

Across Canada, law reform agencies are continuing with positive activity in each jurisdiction albeit under certain financial constraints in several, where governments review their financial abilities to fund every need.

An active and thorough discussion was held on the theme of the meeting which was the relationship between the Uniform Law Conference and our Conference. The routine inclusion of law reform personnel on each jurisdictional delegation to the Uniform Law Conference is strengthening the availability of research support for each; and allows for topics already completed or under way locally to be better prepared where a delegation offers to be the carrier of a topic for the Uniform Law Conference.

The need for a continuing national Law Reform bulletin was accepted by all to assist is avoiding duplication of efforts and the wastage of scarce resources. In addition, preliminary notice of topics being considered or just begun will be helpful as other law reform agencies consider their own future programmes.

The transfer of research papers and materials is encouraged wherever possible, and topics of interest to the Uniform Law Conference can often be well developed from the completed Law Reform reports of one

or several jurisdictions. While it is difficult to commit local resources to joint Uniform Law projects, there is a strong desire to co-operate wherever possible. The Law Reform agencies are also well placed to bring forward ideas for topics through their local jurisdictions.

The style and manner of appointment of law reform personnel to each ULC delegation was also discussed.

The Honourable Mr. Justice David Marshall, Chairman of the North West Territories Committee on Law Reform was elected as the President for 1988-89; and the next meeting of the Conference will be held in Yellowknife, NWT on Sunday, August 13th, 1989.

James R. Breithaupt, QC
President
Law Reform Conference of Canada

APPENDIX J

(See page 30)

RULES OF PRIVATE INTERNATIONAL LAW IN MATRIMONIAL PROPERTY REGIMES

Report of the Québec Representatives

TABLE OF CONTENTS

Introduction

At the 1986 Uniform Law Conference, the Québec delegation was appointed, with the Ontario and Nova Scotia delegations, to make a report on private international law in matrimonial property regimes. The task was to state the difficulties encountered in this matter, to set forth various hypotheses for solutions and their reciprocal advantages and drawbacks and to make a recommendation that would be most acceptable to all the provinces.

I. *Statement of the situation*

The principal difficulties encountered in this matter are, first, the diversity of the rules of conflict of laws of the different provinces of Canada, second, the degree to which legislation on the division of family property and the imperative provisions (primary regime) in Québec have changed the traditional rules of conflict of laws, and third, the interaction existing between marriage contracts and these particular legislations.

A– *The traditional rules of conflict of laws*[1]

1. *In common law*

Traditionally in common law, in the absence of a marriage contract, the movable property of the spouses, whether acquired before or during marriage, is governed by the law of their matrimonial domicile, which is presumed to be that of the husband at the time of marriage. Where the spouses change domicile after their marriage, the law of their new domicile applies, subject to the rights acquired under the previously

applicable law.[2] The rule is generally stated in the following terms: movable property is governed by the law of the husband's domicile at the time it was acquired.[3] Immovable property is governed by the law of the place where it is situated.

Where the spouses have made a marriage contract or where the law of their matrimonial domicile implies the existence of a contract, as is the case in civil law countries, the proper law of the contract applies, subject to public order and the imperative provisions of the province where the performance of the contract is sought. The proper law of the contract means the law chosen by the parties or, failing that, the law more closely connected with the situation. In the absence of any indication to the contrary, the proper law of the contract is presumed to be that of the matrimonial domicile of the spouses at the time of the marriage. The fact that the spouses change domicile or residence after marriage has no effect on the matrimonial regime of the spouses. The law applying to the contract applies to both the movable and immovable property of the spouses if the immovable property is located in the province where the performance of the contract is sought and if its transfer is deemed valid there. The law applying to the contract also determines the capacity of the parties to make a marriage contract and the formal validity of the contract. The formal validity may also be determined in accordance with the law of the place where the deed is drawn up.

The preceding statement makes it possible to observe the traditional distinction in common law between movable and immovable property and between the absence and the existence of a marriage contract. It should be noted that the regime of separation as to property is general in common law and the practice of drawing up a marriage contract rarely exists.

2. *In civil law*[4]

In Québec and traditionally in civil law countries, the spouses are presumed, in the absence of a marriage contract, to have agreed that the law of their matrimonial domicile will determine their regime. Until recently, the matrimonial domicile was deemed to be that of the husband at the time of marriage. Today, given the principle of equality between the spouses and the rule according to which a married woman may have a separate domicile from that of her husband, the notion of matrimonial domicile may be interpreted by the courts as meaning the common domicile of the spouses at the time of their marriage, or failing that, the domicile they establish immediately after the celebration of their marriage.

Where the spouses have drawn up a marriage contract, effect will be given to the law they have expressly or implicitly chosen, subject to public order, the imperative provisions of the law of the place where they reside and good morals. Failing a deliberate choice or an implicit intention, the law of the place where the deed was drawn up determines the law that will apply to the matrimonial regime of the parties. The form of the marriage contract is governed by the law of the place where it was drawn up or by the law of the domicile of the spouses. Nevertheless, a contract drawn up in Québec by the spouses, even if they are domiciled outside the province, must be made by notarized deed. As for the capacity of the parties to contract, it depends on the law of their respective domiciles.

Two noteworthy differences between the rules of common law and those of civil law appear more clearly. Unlike the rules of common law, in civil law the same rules apply equally to movable and immovable property of the spouses, and in the absence of a marriage contract, the regime is fixed at the time of the marriage and does not vary with a change in the domicile of the spouses.

B– *The rules of conflict of laws of new legislation*

1. *Prince Edward Island, Nova Scotia, New Brunswick and Newfoundland*[5]

In 1978, Ontario[6] legislation introduced new rules of conflict of laws which were adopted in the legislation of Prince Edward Island,[7] Nova Scotia,[8] New Brunswick[9] and Newfoundland.[10] In these provisions, three rules and two stages can be identified.

The first stage consists of determining ownership of property between spouses. The first rule indicates that the immovable property is governed by the law of the place where it is situated. The second rule, that movable property is governed by the law of the last common habitual residence of the spouses, or failing that, by the law of the province whose court is seized with the litigation.

The second stage consists of determining which law applies on dissolution of the marriage to the division of the family property, movable or immovable, on a basis other than ownership, with the aim of restoring some economic equality between the spouses. The third and last rule states that the property is divided in accordance with the law of the situation of the last common habitual residence of the spouses, or failing that, with the law of the province whose court is seized with the litigation. In New Brunswick, the rule is slightly different: the law

applying is that of the common habitual residence of the spouses or of either of them, if that spouse has maintained his or her last common habitual residence. In every province, the value of immovable property outside the province of the court seized at the time of division may be taken into account.

It is to be noted that the courts hesitate to apply the law of another province and prefer to decline their jurisdiction in such circumstances in accordance with the doctrine of *forum non conveniens.*[11]

Effect is usually given to marriage contracts which are valid in substance and in form, at least during the life of the marriage. It has been decided,[12] however, that foreign marriage contracts do not exclude the possibility of intervention by the courts to perform the division of family property on a basis other than ownership, upon dissolution of the marriage.

In Prince Edward Island,[13] the provisions respecting the family residence and movable property for household use may not be altered by a marriage contract; these are imperative provisions applying to all spouses. The legislation of the other provinces does not identify any provisions as imperative.

In those provinces, it appears that the traditional rules of common law have been taken up and carried further in the first stage; from partial mutability they go to total mutability; in the second stage, those rules have been replaced by the new rule applying to the division of family property on a basis other than ownership.

2. *Ontario*[14]

In accordance with section 15 of the 1986[15] Act, "the property rights of spouses arising out of the marital relationship are governed by the internal law of the place where both spouses had their last common habitual residence or, if there is no place where the spouses had a common habitual residence, by the law of Ontario."

This rule is applicable where there is no marriage contract. Where there is a contract, effect would be given to the contract, if valid in form and substance in accordance with its proper law, if the law of the place where the spouses had their last common habitual residence so allows, or failing that, if the Ontario Act so allows. If the Ontario Act applies, effect will be given to the contract, except to the extent that it deals with matters that may not be the subject of an agreement owing to a prohibition in the Act,[16] such as: the right to custody of or access to children,

the family residence or waiver of the right to claim support if such waiver resulted in unconscionable circumstances, such as one which allowed one of the spouses to become eligible for welfare.

It must be emphasized that the distinctions between family and other property, and between personal and real property are not made. It would appear that the distinction between rights resulting from ownership and those resulting from division to restore the economic equality of the spouses is not made either.

3. *Alberta and Manitoba*[17]

The division legislation of Alberta and Manitoba does not contain specific provisions of private international law. According to jurisprudence, the court seized, having jurisdiction under the rules of jurisdiction prescribed by the law, will apply its own law. The court has jurisdiction if the spouses have their common habitual residence in the province, or if the spouses had their last common habitual residence there, or failing that, had their residence there at the time of marriage.

On the other hand, an explicit marriage contract or one presumed by the law of the matrimonial domicile of the spouses, would certainly be given effect, and the law governing it would be applied, even if it were a foreign law, if it were valid according to its proper law, and observed the imperative provisions of the law of the province where performance of the contract is sought.

The two provinces interpret differently the notion of common habitual residence of the spouses. In Manitoba, spouses must live together in the same house to be considered to have a common habitual residence, but in Alberta it suffices for them to live in the same province, even if separated.

4. *Saskatchewan and British Columbia*[18]

The legislation of these provinces contains no rules of conflict of laws or of jurisdiction. It appears that they apply either the law more closely connected with the situation, or the traditional rules of common law.

5. *In Québec*[19]

A set of rules, usually called "primary regime", intended to protect the economically weaker spouse and to restore a degree of equality between the spouses, was introduced in 1981. These rules, as they are effects resulting necessarily from the marriage, would form imperative additions to a legal or a conventional matrimonial regime. The rules

deal with the traditional duties of fidelity, help and assistance, the contribution of the spouses and their several obligations towards the household expenses, protection of the family residence and its furniture, and to the right in certain circumstances to a compensatory allowance. It appears that the rules apply to all spouses residing in Québec as provisions having immediate application. A provision is said to have immediate application when it must apply to a given situation, notwithstanding the presence of foreign elements, owing to the very aims of the law and their importance in the organization of the state at the social, economic or political level.

The traditional rules of private international law respecting the legal or conventional matrimonial regime would nevertheless remain applicable.

6. *Some observations*

To conclude, almost all of the new common law legislation prohibits renvoi[20] of their provisions of private international law, and the majority of Québec authors agree that this technique is better suited to certain matters than it is to others; they exclude in particular the matter of matrimonial regimes.

As the preceding summary indicates, the connecting factors in the matter of legal or conventional matrimonial regimes and in the new legislation are numerous and diversified. The principal difficulty arises when a change of residence occurs between a common law province and a civil law one.

Where spouses married in a common law province subsequently settle in Québec, or in another civil law jurisdiction, the Québec courts may, in the present situation, deem that the spouses are, in accordance with the law of their common domicile at the time of the marriage or of their first common habitual residence immediately after the marriage, married in separation as to property. The courts may rule, either that the regime involves the application of legislative rules respecting the division of property in force in the province of the first domicile or first residence, or that the spouses have no acquired rights to a division.[21] According to this hypothesis, the division could then be made under the law of their last common habitual residence, and if that law did not contain rules for the division, as is now the case in Québec, the imperative provisions of the primary regime would apply notwithstanding.

Conversely, where spouses domiciled at the time of their marriage in Québec or in another civil law jurisdiction subsequently settle in an-

other province, the courts of that province would not be required to consider the matrimonial regime fixed between the spouses and could apply to them the regime of their last common habitual residence. That would be equivalent from the point of view of a civilian jurisdiction to denying the acquired rights of the spouses to a legal situation and would cause uncertainty. The courts of the common habitual residence of the spouses could also consider the fact that the law of the matrimonial domicile of the spouses at the time of their marriage implies for them a matrimonial regime equivalent to a regime fixed by contract,[22] and could respect that acquired position subject to the provisions whose application is imperative in the territory of their common habitual residence.

II. *Possible solutions*

1st proposal

Since the most common connecting factor appears to be that of the last common habitual residence of the spouses, the proposed uniform law could be built around that principle in the absence of a marriage contract. Where there is a marriage contract, effect would be given to the law chosen by the parties,[23] subject to certain imperative rules that it would be necessary to specify. Where there is no indication of the law, the criterion of the law more closely connected with the situation[24] could be used.

It is necessary to define the meaning of the last common habitual residence of the spouses. Do they have to live together in the same house or may they live separately in the same province? As we have seen, the provinces do not always have the same interpretation of that notion.

The first proposal may itself be the subject of several hypotheses. According to one hypothesis, in the absence of a contract, the law of the place of the last common habitual residence of the spouses would apply to operate the division of family property and to determine the rights of ownership of the movable property. The law of the place in which the immovable property is located would be respected regarding ownership, but the value of immovable property outside the province of the court seized at the time of the division could be taken into account.

A second hypothesis would consist in applying the law of the last common habitual residence of the spouses to all their property, movable or immovable, family or other, following the Ontario law of 1985.

A third hypothesis, suggested by Mr. Bissett-Johnson, would consist in applying the law of the last common habitual residence of the spouses

where the court is called upon to decide on rights acquired in another jurisdiction or, at its discretion, if it considers that law to be more appropriate than that of the court seized.

2nd proposal

In the second proposal, in the absence of a contract, the law of the first common domicile of the spouses, or the law of the first habitual residence of the spouses immediately after the marriage would be applied. Where there is a marriage contract, effect would be given to the law chosen by the parties, subject to certain imperative rules to be specified. Failing an indication in this respect, the criterion of the law more closely connected with the situation could be used. The second proposal could also be the subject of several hypotheses.

In the first hypothesis, the law of the first common domicile of the spouses, or the law of the first habitual residence of the spouses immediately after their marriage would apply to determine rights of ownership in movable property. The law of the place where immovable property is located would determine its ownership. For the division of family property, the law of the habitual residence of the spouses at the time of the division would apply, if that law contained such rules. Otherwise, as is now the case in Québec, the imperative rules of the primary regime would apply. The value of immovable property located outside the province of the court seized at the time of the division could be taken into account.

A second hypothesis would consist in applying the law of the first common domicile of the spouses, or the law of the first habitual residence of the spouses immediately after their marriage, to all their property, movable or immovable, family or other, as is now the case in Québec.

3rd proposal

In the third proposal, the law applying to the matrimonial regime of the spouses in the absence of a contract would be that of the common habitual residence at the time of the petition for dissolution of the regime, or failing that, of their last common habitual residence; where the law of the matrimonial domicile of the spouses at the time of their marriage fixes implicitly a matrimonial regime equivalent to a regime fixed by contract, that regime would be applied subject to the provisions of the law of the common habitual residence having mandatory application.

Where there is a marriage contract, effect would be given to the law

chosen by the parties, subject to certain imperative rules to be specified. Failing any indication in this respect, the criterion of the law more closely connected with the situation could be used.

In all these hypotheses, it is recommended to exclude renvoi.

III. *Evaluation of proposals*

For the purpose of evaluating the proposals, it could be useful to make clear certain objectives that it might be considered desirable to achieve. For the principal parties interested, the spouses, three objectives could be considered desirable: (1) that the spouses know their rights and obligations in advance and not be subject to the sole discretion of the court, especially if their will has been expressed; (2) that the financially weaker spouse benefit, on dissolution of the regime, from the measures of protection enacted by the law of his habitual residence; and (3) that the solution be simple and comprehensible and not require the application of too many different rules, as the rule of scission would. For the different countries and provinces, the desirable objectives may vary, but some of them may be common, such as the following three: (1) that a single law govern a given situation as far as possible, because savings of time and money for the parties and the courts result therefrom, also the risk of error is reduced and greater access to justice is provided; (2) that the solution respect the juridical system of the country or the province, and be reconcilable with that system and with the family policy underlying the internal legislation; (3) that the solution be valid for any transfer from one country to another, whether their legal systems be the same or different.

Weighing these various objectives and proposals, our evaluation would be as follows:

The 1st proposal

The first hypothesis of the first proposal produces no solution for the difficulty that could result from a transfer from a civil law jurisdiction to a common law one. It also brings a radical change in the concepts and the tradition of the rules of civil law jurisdictions, including Québec. However, it adopts the rules already in force in several common law provinces. Nevertheless, it preserves the principle of scission and makes possible the application of more than one set of legislation.

The second hypothesis contains the same drawbacks, but has the advantage of providing for the application of only one law to the whole of a given situation.

The third hypothesis provides no solution to the difficulty arising out of the transfer from a civil law jurisdiction to a common law one. Nor does it establish a real choice between the law of the court seized and that of the last common habitual residence of the parties, given that in most cases the court seized will be that of the last common habitual residence of the parties. Finally, in leaving to the court discretion to apply the law it considers best, it leaves the spouses in uncertainty when in fact they must know what law governs them, especially if they must compromise, and if it is desired, following mediation, to promote compromises.

The 2nd proposal

The first hypothesis of the second proposal offers the advantage of providing a common solution in that it combines civil law concepts with common law ones. It has the drawback of making a scission between movable and immovable property that does not now exist in Québec law, which as a rule has not existed in civil law jurisdictions for a very long time, and which is tending to disappear, if one can judge by the Ontario law, in common law legislation.

The second hypothesis has as its principal drawback the fact of imposing as a uniform rule the solution used by a single jurisdiction on all others. It does not provide for respect of the other legal systems.

The third proposal has the advantage of providing a common solution in that it combines civil law concepts with common law ones. It also has the advantage of prescribing the application of only one law to the whole of a given situation. It provides a solution to the difficulty that could arise out of a transfer from a civil law jurisdiction to a common law one. It creates no uncertainty for the spouses, while permitting the application of measures of protection. We therefore recommend this proposal.

IV. *Recommendations*

Considering the foregoing, we recommend that the uniform law proposal be based on the following principles:[25]

(1) where there is a contract between the spouses, the proposed law should make it possible to acknowledge and give effect to the contract even if it was made in another province; in this way, the conventional matrimonial regime does not change with a change of domicile or of habitual residence, and effect is given to the law chosen by the spouses, either expressly or implicitly, and when no choice is declared, the law more closely connected with the marriage contract is applied;

(2) where there is no marriage contract, the proposed law should consider, to determine the law applicable to the assets of the spouses, the law of the common habitual residence of the spouses at the time of the petition for dissolution of the regime, or failing that, the law of their last common habitual residence; where the law of the matrimonial domicile of the spouses at the time of their marriage sets up, implicitly and in a suggestive manner, a matrimonial regime equivalent to a regime set up by contract, that regime would be applied, unless the spouses have agreed otherwise;

(3) where either situation exists, the proposal should identify the rules, duties or measures of protection that are of mandatory application to all spouses habitually residing in a province and that override any actual or implied contract;

(4) secondarily, the proposal should limit the notion of common habitual residence of the spouses, and that of matrimonial regime and it should state that renvoi is excluded.

DIRECTION GÉNÉRALE DES AFFAIRES LÉGISLATIVES
MINISTÈRE DE LA JUSTICE DU QUÉBEC
May 6, 1988

---

(1) J G Castel, *Canadian Conflict of Laws in Canada*, Toronto, Butterworths, 1986, pp. 429-445; J. G. McLeod, *The Conflict of Laws*, Toronto, Carswell, 1983, pp 371-398, p 372; A Bissett-Johnson and V. Black, "An Introduction to Matrimonial Property and the Conflict of Laws" in A Bissett-Johnson, W. H Holland and W. F. Bowker, *Matrimonial Property Law In Canada*, Carswell, 1980, pp. I-69 à I-91.

---

(2) against J. G. Castel, (1982) 71 R.c.d.i.p. 312, p. 319: "A change in the matrimonial domicile of the spouses during the marriage does not affect the matrimonial regime. (. . .) It would appear that for certain courts assets acquired before the change of domicile remain subject to the law of the first matrimonial domicile, while assets acquired after the change are governed by the law of the new domicile. The majority appear to prefer the doctrine of immutability" (Translation)

---

(3) J. G McLeod in A. Bissett H Johnson, W. H. Holland and W. F. Bowker, *op cit* , note 1, p 0-64.

---

(4) E Groffier, *Précis de droit international privé québécois*, Montréal, 1984, pp. 142 et seq.; J. G. Castel, *Droit international privé québécois*, Toronto, Butterworths, 1980, pp 561 et seq.

Note that if, where there is no marriage contract, the civil law jurisdictions traditionally apply the law of the matrimonial regime applicable at the time of the marriage. Switzerland has broken with that tradition in its proposed federal law on private international law dated 18 December 1987 by providing for the application in the case of transfer of domicile of the spouses from one country to another of the laws of the new domicile, unless otherwise agreed between the spouses

---

(5) A Bissett-Johnson and V. Black, *loc.cit.*, note 1, p. I-79

(6) *Family Law Reform Act* , S O 1978, c 2, ss 13(1), (2), 49(1), 57

(7) *Family Law Reform Act* , S P E I 1978, c. 6, ss. 14(1) (2), 49(1), 57

(8) *Matrimonial Property Act*, S N S , 1980, c 9, s 22

(9) *Marital Property Act*, S N B , 1980, c M-7 1, s 45.

(10) *The Matrimonial Property Act*., S NFLd 1979, c. 32, ss 5, 30

(11) J. G Castel, *loc cit* , note 2, p 323

(12) *Sinnett* v *Sinnett*, (1980) 15 R F L (2d) 115 (Ont Co Ct); *Kerr* v *Kerr* , (1981) 32 O R (2d) 146 H C

(13) *op cit* , note 7, s. 51(2)

(14) J G. McLeod, in A Bissett-Johnson, W H Holland and W F Bowker, *op cit* , note 1, p 0-64 et seq

(15) *An Act to revise the Family Law Reform Act*, S O 1986, c 4, ss 15, 58

(16) *Ibid* , s 58, 33(4), 52(2)

(17) A Bissett-Johnson and V. Black, *loc cit* , note 1, p. I-79

(18) *Ibid* , p I-81 to I-83

(19) E Groffier, *op cit* , note 4, p 97

(20) See, for example, section 15 of the Ontario law referring to "internal law" The Nova Scotia law refers in section 22 to "the law" without qualification Renvoi is therefore possible In Québec law, see E Groffier, *op cit* , note 4, p 50

(21) Whereas the Québec Superior Court in *Charpentier* v. *Smith-Dorion*, (1981) C S 84, was of the opinion that the "family assets" regime of Ontario did not constitute a real matrimonial regime, the Court of Appeal more recently decided in *Palmer* v *Mulligan* (1985) R D J 247, p 254 that:

"the notion of the matrimonial regime, by reason of legislative development, henceforth includes the possibility of legal action to change the distribution of the assets of the spouses at the time of dissolution of the marriage. To the extent that foreign legislation or the legislation of another province is applied, that legislation must be taken into account as part of the matrimonial regime"

To end such controversies, the notion of matrimonial regime should be defined, in order to determine whether "family assets" legislation forms part of it That would also make it possible to set up a legal structure within which uniform rules could be drawn up.

(22) *Beaudoin* v *Trudel* (1937) O R (C A); *Re De Nicols* (No 2), (1900) 2 Ch 410; A Bissett-Johnson, W. H Holland and W F Bowker, *op.cit* , note 1, p I-84

(23) The *Hague Convention on the Law Applicable to Matrimonial Property Regimes*, 23 October 1976, restricts the choice of the spouses to a law that has some connection

with them, being the law of a state whose nationality is held by one of the spouses at the time of that designation, or the law of the territory in which one of the spouses has his habitual residence at the time of that designation, or the law of the first state of the territory in which one of the spouses establishes a new habitual residence after the marriage

We do not recommend introducing such restrictions Not only does it not appear expedient to so restrict the freedom of the spouses, but it also appears unnecessary to do so, given that the question does not appear to have been raised in Canadian jurisprudence

---

(24) The draft of the Act to add the reformed law of evidence and prescription and private international law to the Civil Code of Québec abandons the connection to the law of the place where the deed is executed in favour of the law with which the deed has the closest connection

---

(25) Other questions could be the subject of provisions, such as the validity of changing a regime by convention that could be subject to the law of the habitual common residence of the spouses at the time of the change

APPENDICE J

(voir page 30)

RÈGLES DE DROIT INTERNATIONAL PRIVÉ EN MATIÈRE DE RÉGIMES MATRIMONIAUX

Rapport des représentants du Québec

TABLE DES MATIÈRES

Introduction

À la réunion de 1986 de la Conférence pour l'uniformisation des lois, la délégation du Québec a été mandatée, avec celles de l'Ontario et de la Nouvelle-Écosse, pour faire un rapport sur le droit international privé des régimes matrimoniaux. Il s'agit d'exposer les difficultés rencontrées en la matière, de faire état de différentes hypothèses de solution ainsi que de leur avantages et inconvénients réciproques et, ultimement, de proposer une recommandation qui soit la plus acceptable pour toutes les provinces.

I. *L'exposé de la situation*

Les principales difficultés rencontrées en la matière sont, premièrement, la diversité des règles de conflit de lois des différentes provinces du Canada; deuxièmement, la mesure dans laquelle les législations sur le partage des biens familiaux et les dispositions impératives (le régime primaire) au Québec ont modifié les règles traditionnelles de conflits des lois; et, troisièmement, l'interaction qui existe entre les contrats de mariage et ces législations particulières.

A- *Les règles traditionnelles de conflits de lois*[1]

1- *En common law*

Traditionnellement, en common law, en l'absence de contrat de mariage, les biens meubles des époux, qu'ils soient acquis avant ou

pendant le mariage sont régis par la loi de leur domicile matrimonial, lequel est présumé être celui du mari au moment du mariage. Lorsque les époux changent de domicile après leur mariage, la loi de leur nouveau domicile s'applique sous réserve des droits acquis sous l'empire de la loi antérieurement applicable.[2] Cette règle est généralement énoncée par la proposition suivante: les meubles sont régis par la loi du domicile du mari au moment de leur acquisition.[3] Quant aux immeubles, ils sont régis par la loi du lieu de leur situation.

Lorsque les époux ont conclu un contrat de mariage ou, encore, lorsque la loi de leur domicile matrimonial leur en présume un, comme c'est le cas dans les pays de droit civil, la loi propre de ce contrat s'applique, sous réserve de l'ordre public et des dispositions impératives de la province où l'exécution de ce contrat est recherchée. On entend par loi propre, la loi choisie par les parties ou, à défaut, la loi qui est la plus intimement liée à la situation. En l'absence d'indication contraire, la loi propre du contrat est présumée être celle du domicile matrimonial des époux au moment du mariage. Le fait que les époux changent de domicile ou de résidence après le mariage n'a pas d'incidence sur le régime matrimonial des époux. La loi applicable au contrat s'applique à la fois aux meubles des époux et à leurs immeubles si, dans le cas de ces derniers, ils sont situés dans la province où l'exécution du contrat est demandée et si leur transfert y est considéré comme valable. La loi applicable au contrat détermine également la capacité des parties de faire un contrat de mariage et la validité formelle de ce contrat. Cette dernière peut également être établie suivant la loi du lieu où l'acte est fait.

L'exposé qui précède permet de remarquer la distinction établie traditionnellement en common law entre les meubles et les immeubles ainsi qu'entre l'absence et la présence d'un contrat de mariage. Notons cependant que le régime de la séparation de biens est de diffusion générale en common law et la pratique d'établir un contrat de mariage, presque inexistante.

2– *En droit civil*[4]

Au Québec et traditionnellement dans les pays de droit civil, les époux sont présumés, en l'absence de contrat de mariage, s'en être remis à la loi de leur domicile matrimonial pour déterminer leur régime. Jusqu'à tout récemment, ce domicile matrimonial était supposé être celui du mari au moment du mariage. Aujourd'hui, étant donné le principe d'égalité entre les époux et la règle selon laquelle la femme mariée peut désormais avoir un domicile distinct de celui de son mari, la notion de domicile matrimonial pourrait être interprétée par les tribu-

naux comme signifiant le domicile commun des époux au moment de leur mariage ou, à défaut, celui qu'ils établissent immédiatement après la célébration de leur mariage.

Dans le cas où les époux établi un contrat de mariage, on donnera effet à la loi qu'ils ont choisi expressément ou implicitement, sous réserve de l'ordre public, des dispositions impératives de la loi du lieu où ils résident et des bonnes moeurs. À défaut de choix exprès ou d'intention présumée, la loi du lieu où l'acte a été passé détermine la loi qui s'appliquera au régime matrimonial des parties. Quant à la forme du contrat de mariage, elle est régie par la loi du lieu où il est passé ou par la loi du domicile des époux. Cependant, le contrat passé au Québec par des époux, même domiciliés à l'extérieur de la province, doit obligatoirement être fait par acte notarié. Enfin, en ce qui concerne la capacité des parties de contracter, elle dépend de la loi de leur domicile respectif.

Deux différences notables, entre les règles de common law et celles du droit civil, apparaissent plus clairement. Contrairement aux règles de common law, en droit civil les mêmes règles s'appliquent indifféremment aux meubles et aux immeubles des époux et, en l'absence de contrat de mariage, le régime est fixé au moment du mariage et ne varie pas avec le changement de domicile des époux.

B– *Les règles de conflit de lois des nouvelles législations*

1– *L'Île-du-Prince-Édouard, la Nouvelle-Écosse, le Nouveau-Brunswick et Terre-Neuve*[5]

En 1978, la législation ontarienne[6] a introduit de nouvelles règles de conflit de lois lesquelles ont été reprises dans les législations de l'Île-du-Prince-Édouard,[7] de la Nouvelle-Écosse,[8] du Nouveau-Brunswick[9] et de Terre-Neuve.[10] Suivant ces dispositions, on distingue trois règles et deux étapes.

La première étape consiste à déterminer la propriété des biens entre les époux. La première règle indique que les immeubles sont régis par la loi de leur situation. La seconde, que les meubles sont régis par la loi de la dernière résidence habituelle commune des époux ou, à défaut, par la loi de la province dont le tribunal est saisi du litige.

La seconde étape consiste à établir la loi applicable à la dissolution du mariage au partage des biens familiaux, meubles ou immeubles, sur une base autre que la propriété, dans le but de rétablir une certaine égalité économique entre les époux. La troisième et dernière règle est alors à l'effet que ces biens sont partagés suivant la loi du lieu de la dernière résidence habituelle commune des époux ou, à défaut, par la

loi de la province dont le tribunal est saisi du litige. Au Nouveau-Brunswick, la règle est quelque peu différente: la loi applicable est celle de la résidence habituelle commune des époux ou de l'un d'eux s'il l'a maintenu au lieu de la dernière résidence habituelle commune des époux. Dans toutes les provinces, il peut cependant être tenu compte de la valeur des biens immeubles situés à l'extérieur de la province du tribunal saisi lors du partage.

Il est à noter que les tribunaux hésitent à appliquer la loi d'une autre province et préfèrent décliner, dans les circonstances, leur compétence suivant la doctrine du forum non conveniens.[11]

Il est généralement donné effet aux contrats de mariage, qui sont par ailleurs valables quand au fond et à la forme, du moins pendant la durée du mariage. On a cependant décidé[12] que les contrats de mariage étrangers n'excluaient pas la possibilité pour les tribunaux d'intervenir pour effectuer le partage des biens familiaux, sur une base autre que la propriété, à la dissolution du mariage.

Notons qu'à l'Île-du-Prince-Édouard,[13] les dispositions relatives à la résidence familiale et aux meubles affectés à l'usage du ménage ne peuvent être modifiés par contrat de mariage; il s'agit donc de dispositions impératives qui s'appliquent à tous les époux. Les législations des autres provinces n'identifient pas les dispositions qu'elles considèrent impératives.

Dans ces provinces, il semble donc que les règles traditionnelles de common law aient, au stade de la première étape, été reprises et poussées plus loin; on passe en effet de la mutabilité partielle à la mutabilité totale; au stade de la seconde étape, ces règles ont été supplantées par la nouvelle règle applicable au partage des biens familiaux sur une base autre que la propriété.

2– *L'Ontario*[14]

Suivant l'article 15 de la législation de 1986,[15] "les droits de propriété des conjoints qui résultent de la relation matrimoniale sont régis par le droit interne du lieu où les conjoints avaient leur dernière résidence habituelle commune ou, à défaut, par la loi de l'Ontario".

Cette règle est applicable en l'absence de contrat de mariage. Dans l'éventualité contraire, il serait donné effet au contrat, par ailleurs valable en la forme et le fond suivant sa loi propre, si la loi du lieu où les conjoints avaient leur dernière résidence habituelle commune ou, à défaut, la loi de l'Ontario le permet. Si la loi ontarienne est applicable, il

sera donné effet au contrat, sauf dans la mesure où il porte sur des matières qui ne peuvent faire l'objet d'entente, en raison d'une prohibition de la loi,[16] telles: le droit de garde et de visite d'un enfant, la résidence familiale ou la renonciation au droit de réclamer des aliments si cette renonciation donnait lieu à une situation inacceptable, comme celle qui permettrait à l'un des époux de devenir admissible à l'aide sociale.

Soulignons que les distinctions entre les biens familiaux et les autres, de même qu'entre les meubles et les immeubles n'est pas reprise. Il semblerait qu'il en soit de même de la distinction entre les droits résultant de la propriété et ceux qui résultent du partage pour rétablir l'égalité économique des conjoints.

3- *L'Alberta et le Manitoba*[17]

Les législations de partage de l'Alberta et du Manitoba ne contiennent pas de dispositions spécifiques de droit international privé. Suivant la jurisprudence, le tribunal saisi, compétent suivant les règles de juridiction prévues dans la loi, applique sa propre loi. Or, le tribunal est compétent si les époux ont leur résidence commune habituelle dans la province ou si les époux y avaient leur dernière résidence habituelle commune ou, à défaut, si, au moment de leur mariage ils y avaient leur résidence.

Par contre, il serait sans doute donné effet à un contrat de mariage exprès, ou présumé par la loi du domicile matrimonial des époux, et on lui appliquerait la loi qui le régit, même s'il s'agit d'une loi étrangère, s'il est par ailleurs valable suivant sa loi propre, et s'il respecte les dispositions impératives de la loi de la province où l'exécution du contrat est recherché.

Il est à noter que les deux législations ont une interprétation différente de la notion de résidence habituelle commune des époux. Alors qu'au Manitoba, les époux doivent vivrent ensemble dans la même maison pour qu'on considère qu'ils ont une résidence habituelle commune, il suffit en Alberta qu'ils vivent dans la même province, même s'ils y sont séparés.

4- *La Saskatchewan et la Colombie-Britannique*[18]

Les législations de ces provinces ne contiennent aucune règle de conflit de loi ou de juridiction. Il semble que ces provinces appliquent tantôt la loi qui présente les liens les plus étroits avec la situation, tantôt les règles traditionnelles de common law.

5– *Au Québec*[19]

Un ensemble de règles, que l'on appelle habituellement "régime primaire", et qui visent à protéger le conjoint le plus faible économiquement et à rétablir entre les deux époux une certaine égalité, ont été introduites en 1981. Ces règles, s'agissant d'effets qui découlent nécessairement du mariage, s'ajoutent, de manière impérative, au régime matrimonial légal ou conventionnel. Il s'agit notamment de règles relatives aux devoirs traditionnels de fidélité, de secours et d'assistance, à la contribution des époux et à leur obligation solidaire aux charges du ménage, à la protection de la résidence familiale et des meubles, et à un droit, dans certaines circonstances, à une prestation compensatoire. Il semble que ces règles s'appliquent à tous les époux qui résident au Québec en tant que dispositions d'application immédiate. On est en effet, en présence d'une disposition d'application immédiate, lorsque celle-ci doit s'appliquer à une situation donnée malgré la présence d'éléments étrangers, à cause des objectifs mêmes de la loi et de leur importance dans l'organisation étatique au niveau social, économique ou politique.

La règles traditionnelles de droit international privé relatives au régime matrimonial légal ou conventionnel seraient par ailleurs toujours applicables.

6– *Quelques constatations*

Pour finir, notons que les nouvelles législations de common law ont presque toutes banni le renvoi[20] de leurs dispositions de droit international privé et que la plupart des auteurs québécois s'accordent à dire que cette technique convient mieux à certaines matières qu'à d'autres; ils en excluent notamment la matière des régimes matrimoniaux.

Comme on peut le constater de l'exposé qui précède, les facteurs de rattachement en matière de régimes matrimoniaux conventionnels ou légaux et dans les nouvelles législations sont fort nombreux et diversifiés. La principale difficulté surgit lorsque le changement de résidence s'opère entre une province de common law et un état de droit civil.

Si des époux mariés dans une province de common law s'établissent par la suite au Québec, ou dans un autre état de droit civil, les tribunaux québécois peuvent, dans l'état actuel des choses, considérer que les époux sont, conformément à la loi de leur domicile commun au moment du mariage ou de leur première résidence habituelle commune immédiatement après leur mariage, mariés en séparation de biens. Dès lors, les tribunaux peuvent statuer, soit que ce régime emporte l'application des règles législatives relatives au partage des biens en vigueur dans

la province de ce premier domicile ou de cette première résidence, soit que les époux n'ont pas de droit acquis au partage.[21] Dans cette dernière hypothèse, le partage pourrait alors s'effectuer en vertu de la loi de leur dernière résidence habituelle commune et si cette loi ne comporte pas de règles sur le partage, comme c'est le cas à l'heure actuelle au Québec, les dispositions impératives du régime primaire s'appliqueraient néamoins.

Si, à l'inverse, des époux domiciliés lors de leur mariage au Québec, ou dans un autre état de droit civil, s'établissent dans une autre province par la suite, les tribunaux de cette dernière province pourrait ne pas tenir compte du régime matrimonial établi entre les époux et leur appliquer le régime de leur dernière résidence habituelle commune. Cela équivaudrait, du point de vue d'un état civiliste à nier les droits acquis des conjoints à une situation juridique et provoquerait de l'incertitude. Les tribunaux de la dernière résidence habituelle commune des époux pourraient également considérer le fait que la loi du domicile matrimonial des époux au moment de leur mariage leur présume un régime matrimonial équivalant à un régime établi contractuellement,[22] et respecter cette situation acquise sous réserve des dispositions s'appliquant impérativement dans le territoire de leur résidence habituelle commune.

II. *Les solutions possibles*

1ère proposition

Puisque le facteur de rattachement le plus courant semble être celui de la dernière résidence habituelle commune des conjoints, le projet de loi uniforme pourrait s'élaborer autour de ce principe, en l'absence de contrat de mariage. En présence d'un contrat de mariage, il serait donné effet, sous réserve de certaines règles impératives qu'il faudrait préciser, è la loi choisie par les parties.[23] À défaut d'indication à cet égard, on pourrait retenir le critère de la loi la plus étroitement liée à la situation.[24]

Encore faut-il définir ce que l'on entend par la dernière résidence habituelle commune des époux. Doivent-ils vivrent ensemble dans la même maison ou peuvent-ils vivre séparés dans la même province? Comme on l'a vu, les provinces n'ont pas toujours la même interprétation de la notion.

Cette première proposition peut, elle-même faire l' objet de plusieurs hypothèses. Suivant une première hypothèse, en l'absence de contrat, la loi du lieu de la dernière résidence habituelle commune des époux s'appliquerait pour opérer le partage des biens familiaux et pour déterminer les droits de propriété dans les biens meubles. On respecterait la loi du lieu de la situation des biens immeubles quant à la propriété, mais

il pourrait être tenu compte de la valeur des biens immeubles situés à l'extérieur de la province du tribunal saisi lors du partage.

Une deuxième hypothèse consisterait à appliquer la loi de la dernière résidence habituelle commune des époux à tous leurs biens, meubles ou immeubles, familiaux ou non, à l'instar de la loi ontarienne de 1985.

Une troisième hypothèse, suggérée par M. Bisset-Johnson, consisterait à appliquer la loi de la dernière résidence habituelle commune des époux dans le cas où le tribunal est appelé à se prononcer sur des droits acquis dans un autre État ou, à sa discrétion, s'il considère que cette loi est plus appropriée que celle du for (tribunal saisi).

2ème proposition

Suivant une deuxième proposition, on appliquerait, en l'absence de contrat, la loi du premier domicile commun des époux, ou encore la loi de la première résidence habituelle des époux immédiatement après leur mariage. En présence d'un contrat de mariage, il serait donné effet, sous réserve de certaines règles impératives qu'il faudrait préciser, à la loi choisie par les parties. À défaut d'indication à cet égard, on pourrait retenir le critère de la loi la plus étroitement liée à la situation. Là encore, cette deuxième proposition peut faire l'objet de plusieurs hypothèses.

Suivant une première hypothèse, la loi du premier domicile commun des époux, ou encore la loi de la première résidence habituelle des époux immédiatement après leur mariage s'appliquerait pour déterminer les droits de propriété dans les biens meubles. On respecterait la loi du lieu de la situation des biens immeubles quant à leur propriété. On appliquerait cependant pour le partage des biens familiaux la loi de leur résidence habituelle au moment du partage, se celle-ci comprend de telles règles. Sinon, comme c'est le cas présentement au Québec, les règles impératives du régime primaire s'appliqueraient néanmoins. Il pourrait être tenu compte de la valeur des biens immeubles situés à l'extérieur de la province du tribunal saisi lors du partage.

Une seconde hypothèse consisterait à appliquer la loi du premier domicile commun des époux, ou encore la loi de la première résidence habituelle des époux immédiatement après leur mariage, à tous leurs biens, meubles ou immeubles, familiaux ou non, comme c'est le cas actuellement au Québec.

3ème proposition

Suivant une troisième et dernière proposition, la loi applicable au régime matrimonial des époux, en l'absence de contrat, serait celle de leur résidence habituelle commune au moment de la demande de disso-

lution du régime ou, à défaut, celle de leur dernière résidence habituelle commune; cependant, dans le cas où la loi du domicile matrimonial des époux au moment de leur mariage établit, par présomption, un régime matrimonial équivalant à un régime établi contractuellement, c'est ce régime qui serait appliqué sous réserve des dispositions de la loi de la résidence habituelle commune s'appliquant impérativement.

En présence d'un contrat de mariage, il serait donné effet, sous réserve de certaines règles impératives qu'il faudrait préciser, à la loi choisie par les parties. À défaut d'indication à cet égard, on pourrait retenir le critère de la loi la plus étroitement liée à la situation.

Il est noter que dans toutes ces hypothèses il est recommandé d'exclure le renvoi.

III. *Évaluation des propositions*

Dans le but de mieux évaluer ces propositions, il peut être utile de dégager certains objectifs que l'on peut considérer comme souhaitables d'atteindre. Ainsi, pour les principaux intéressés, les époux, trois objectifs peuvent être considérés souhaitables: 1° que les époux connaissent d'avance leurs droits et obligations et ne soient pas soumis à la seule discrétion du tribunal, surtout si leur volonté a été exprimée, 2° que l'époux le plus faible économiquement puisse bénéficier, à la dissolution du régime, des mesures de protection édictées par la loi de sa résidence habituelle et 3° que la solution soit simple et compréhensible et n'oblige pas à l'application de trop de règles différentes, comme le ferait, la règle de la scission. Pour les états et provinces, les objectifs souhaitables peuvent être divers, mais sans doute certains d'entre eux peuvent-ils être communs, tels les trois suivants: 1° qu'un seule loi régisse, dans la mesure du possible, une situation donnée, car ainsi il en résulte, pour les parties et les tribunaux, des économies de temps et d'argent, un risque moindre d'erreur et partant une meilleure accessibilité à la justice, 2° que la solution respecte le système juridique d l'état et de la province et qu'elle soit donc conciliable avec ce système et avec la politique familiale sous-jacente à la législation interne, 3° que la solution vaille pour tout transfert d'un état à un autre, que leur système juridique soit le même ou qu'il soit différent.

À jauger ces divers objectifs et propositions notre évaluation serait celle-ci:

La 1ère proposition

La première hypothèse de la première proposition n'apporte pas de solution à la difficulté qui peut résulter d'un transfert d'un état de droit

civil à un de common law. De plus, elle opère un changement radical dans les concepts et la tradition des règles des états de droit civil, dont le Québec. Cependant elle reprend les règles qui sont déjà en vigueur dans plusieurs provinces de common law. Par ailleurs, elle conserve le principe de la scission et permet l'application de plus d'une législation.

La deuxième hypothèse comporte les mêmes inconvénients, mais elle a cependant l'avantage de ne prévoir l'application que d'une seule loi à l'ensemble d'une situation donnée.

La troisième hypothèse n'apporte pas de solution à la difficulté qui peut résulter d'un transfert d'un état de droit civil à un de common law. De plus, elle n'établit pas un véritable choix entre la loi du tribunal saisi et celle de la dernière résidence habituelle commune des parties, étant donné que, le plus souvent, le tribunal saisi sera justement celui de la dernière résidence habituelle commune des parties. Enfin, en laissant au tribunal une discrétion d'appliquer la loi qu'il considère la meilleure, les époux sont laissés dans l'incertitude; or, ils doivent savoir quelle loi les régit, surtout s'ils doivent transiger et si l'on veut, suite à la médiation, favoriser les transactions.

La 2ième proposition

La première hypothèse de la deuxième proposition présente l'avantage d'offrir une solution mitoyenne en ce qu'elle allie les concepts de droit civil avec ceux de common law. Elle a cependant pour inconvénient de réaliser une scission entre les biens meubles et les biens immeubles qui n'existe pas à l'heure actuelle en droit québécois, qui n'existe généralement plus depuis fort longtemps dans les états de droit civil, et qui tend à disparaître, si on en juge par la loi ontarienne, dans les législations de common law.

La seconde hypothèse a pour principal inconvénient d'imposer, comme règle uniforme, la solution retenue par une seule juridiction à l'ensemble des autres. Elle ne permet pas de respecter les autres systèmes juridiques.

La troisième proposition présente l'avantage d'offrir une solution mitoyenne en ce qu'elle allie les concepts de droit civil avec ceux de common law. Elle a également l'avantage de ne prévoir l'application que d'une seule loi à l'ensemble d'une situation donnée. Elle apporte une solution à la difficulté qui peut résulter d'un transfert d'un état de droit civil à un de common law. Enfin, elle ne génère pas d'incertitude pour les époux tout en permettant l'application de mesures de protection. Aussi est-ce celle que nous recommandons.

IV. Les recommandations

Compte tenu de ce qui précède, nous recommandons que la proposition de loi uniforme s'articule autour des principes suivants:[25]

1° en présence d'un contrat entre les époux, la proposition de loi devrait permettre de reconnaître et de donner effet à ce contrat, même s'il a été fait dans une autre province; ainsi, le régime matrimonial conventionnel ne change pas avec le changement de domicile ou de résidence habituelle et l'on donne effet à la loi choisie par les époux soit expressément, soit implicitement et, si aucun choix n'est exprimé, on applique au contrat de mariage la loi qui présente avec lui les liens les plus étroits;

2° en l'absence de contrat de mariage, la proposition devrait considérer, pour établir la loi applicable aux biens des époux, la loi de la résidence habituelle commune des époux au moment de la demande de dissolution du régime ou, à défaut, celle de leur dernière résidence habituelle commune; cependant, dans le cas où la loi du domicile matrimonial des époux au moment de leur mariage établit, par présomption et de manière supplétive, un régime matrimonial équivalant à un régime établi contractuellement, c'est ce régime qui serait appliqué, à moins que les époux n'aient convenu autrement;

3° que l'une ou l'autre de ces situations se présente, la proposition devrait identifier les règles, devoirs ou mesures de protection qui s'appliquent de manière impérative à tous les époux qui résident habituellement dans une province et qui prévalent sur tout contrat, fait ou présumé;

4° subsidiairement, la proposition devrait circonscrire la notion de résidence habituelle commune des époux, celle du régime matrimonial et elle devrait affirmer le rejet du renvoi.

DIRECTION GÉNÉRALE DES AFFAIRES LÉGISLATIVES
MINISTÈRE DE LA JUSTICE DU QUÉBEC
6 juin 1988

---

1) J G Castel, *Canadian Conflict of Laws in Canada*, Toronto, Butterworths, 1986, pp 429-445; J. G. McLeod, *The Conflict of Laws*, Toronto, Carswell, 1983, pp 371-398, p 372; A Bissett-Johnson et V Black, "An Introduction to Matrimonial Property and the Conflict of Laws" dans A. Bissett-Johnson, W H. Holland and W F Bowker, *Matrimonial Property Law In Canada*, Carswell, 1980, pp I-69 à I-91

---

2) contra J G Castel, (1982) 71 R c d.i p 312, p. 319: "Un changement du domicile matrimonial des époux pendant le mariage n'affecte pas le régime matrimonial (. .) Il semblerait que pour certains tribunaux les biens acquis avant le changement de dom-

icile restent soumis à la loi du premier domicile matrimonial, tandis que les biens acquis après ce changement sont régis par la loi du nouveau domicile La majorité semble préférer la doctrine de l'immutabilité"

3) J G McLeod dans A Bissett H Johnson, W H. Holland et W F Bowker, *op cit* , note 1, p 0-64

4) E Groffier, *Précis de droit international privé québécois*, Montréal, 1984, pp. 142 et s; J. G Castel, *Droit international privé québécois*, Toronto, Butterworths, 1980, pp 561 et s

Notons que si, en l'absence de contrat de mariage, les états de droit civil appliquent traditionnellement la loi du régime matrimonial applicable au moment du mariage, la Suisse a, dans la proposition de Loi fédérale sur le droit international privé du 18 décembre 1987, brisé avec cette tradition, en prévoyant appliquer, en cas de transfert du domicile des époux d'un état dans un autre, le droit du nouveau domicile, sauf entente des époux au contraire

5) A Bissett-Johnson et V Black, *loc cit.*, note 1, p I-79

6) *Family Law Reform Act*., S.O. 1978, c 2, arts 13(1), (2), 49(1), 57

7) *Family Law Reform Act* , S P E I 1978, c 6, arts 14(1) (2), 49(1), 57

8) *Matrimonial Property Act*, S.N S , 1980, c 9, art 22

9) *Marital Property Act*, S N B , 1980, c M-7 1, art 45

10) *The Matrimonial Property Act* , S NFld 1979, c. 32, arts 5, 30

11) J G Castel, *loc cit* , note 2, p 323

12) *Sinnett* c. *Sinnett*, (1980) 15 R.F L (2d) 115 (Ont Co Ct); *Kerr* c *Kerr* , (1981) 32 O R (2d) 146 H C

13) *op cit* , note 7, art 51(2)

14) J. G McLeod, dans A Bissett-Johnson, W H Holland et W F Bowker, *op cit* , note 1, p 0-64 et s

15) *An Act to revise the Family Law Reform Act*, S O 1986, c 4, arts 15, 58

16) *Ibid.*, arts 58, 33(4), 52(2)

17) A Bissett-Johnson et V Black, *loc cit* , note 1, p I-79

18) *Ibid* , p 1-81 à I-83

19) E Groffier, *op.cit* , note 4, p. 97

20) voir, par exemple, l'article 15 de la Loi de l'Ontario qui réfère au "droit interne" La loi de la Nouvelle-Écosse, à l'article 22, fait référence au "droit" sans le qualifier Le renvoi pourrait donc être possible En droit québécois, v E Groffier, *op cit* , note 4, p. 50

21) Alors que la Cour supérieure du Québec, dans l'affaire *Charpentier* c. *Smith-Doirion*, (1981) C.S. 84, a considéré que le régime des "family assets" de l'Ontario ne constituait pas réellement un régime matrimonial, la Cour d'appel, plus récemment, dans *Palmer* c *Mulligan* (1985) R D J. 247, p. 254 a décidé que:

"la notion de régime matrimonial, en raison de l'évolution législative, comprend désormais une possibilité d'intervention judiciaire pour modifier la répartition des biens des conjoints lors de la dissolution du mariage Dans la mesure où l'on applique la législation étrangère ou celle d'une autre province, on doit tenir compte de cette législation comme partie du régime matrimonial".

Pour mettre fin à ces controverses, il faudrait définir la notion de régime matrimonial, afin de déterminer si les législations des "family assets" en font partie. Ceci permettrait également de fixer le cadre juridique dans lequel s'inscriront les règles uniformes.

22) *Beaudoin* v. *Trudel*, (1937) O.R. (C.A.); *Re De Nicols* (No 2), [1900] 2 Ch. 410; A Bissett-Johnson, W. H Holland et W. F. Bowker, *op.cit.*, note 1, p I-84

23) La *Convention de la Haye sur la Loi applicable aux régimes matrimoniaux*, du 23 octobre 1976, limite le choix des époux à une loi qui ait avec eux certaines attaches, soit la loi d'un état dont l'un des époux a la nationalité au moment de cette désignation, soit la loi sur le territoire duquel l'un des époux a sa résidence habituelle au moment de cette désignation, soit, enfin, la loi du premier état sur le territoire duquel l'un des époux établira une nouvelle résidence habituelle après le mariage.

Nous ne recommandons pas d'introduire de telles limitations. En effet, outre qu'il n'apparaît pas opportun d'ainsi limiter la liberté des époux, il paraît inutile de le faire étant donné que la question ne semble pas avoir été soulevée dans la jurisprudence canadienne.

24) L'avant-projet de Loi portant réforme au Code civil du Québec du droit de la preuve et de la prescription et du droit international privé abandonne le rattachement à la loi du lieu où l'acte est passé en faveur de la loi avec laquelle l'acte présente les liens les plus étroits.

25) D'autres questions pourraient faire l'objet de dispositions telles la validité de la modification conventionnelle de régime qui pourrait être soumise à la loi de la résidence habituelle commune des époux au moment de la modification

APPENDICE K

(voir page 31)

LOI UNIFORME SUR LA SANTÉ MENTALE

Remarques générales

En 1984, une conférence de la Division de la santé mentale de Bien-être Canada et des directeurs provinciaux des services de santé mentale a demandé à la Conférence sur l'uniformisation des lois d'entreprendre la rédaction d'une loi uniforme sur la santé mentale traitant de la cure obligatoire et du traitement forcé en tenant particulièrement compte de la Charte des droits. La Conférence a donc créé un comité chargé d'élaborer un projet de loi, de consulter les groupements nationaux que le sujet intéresse et de lui rendre compte de ses travaux. Ce comité se composait des directeurs provinciaux des services de santé mentale et d'avocats provenant de sept compétences du Canada.

Le comité a élaboré la Loi uniforme sur la santé mentale après avoir étudié les observations et les critiques d'un large éventail d'organismes intéressés d'envergure nationale sur deux versions précédentes de la loi. La Conférence sur l'uniformisation des lois a adopté la loi à sa réunion d'août 1987.

Table des matières

1.(1) Les définitions qui suivent s'appliquent à la présente loi. *Définitions*

"conseil de révision" Conseil de révision constitué en vertu de l'article 32. *"Review Board"*

Remarque

Le paragraphe 26(1) permet au médecin d'un malade en cure obligatoire de demander au conseil de révision, au moyen d'une requête, l'autorisation, dans certains circonstances, d'administrer un traitement psychiatrique et un autre traitement médical connexe précis. La définition de "traitement médical connexe" précise que le traitement doit être nécessaire pour administrer le traitement psychiatrique ou contrôler les effets indésirables du traitement psychiatrique.

"dirigeant responsable" Responsable de l'administration et de la direction d'un établissement psychiatrique ou personne qu'il a désignée par écrit. *"chief administrative officer"*

"établissement psychiatrique" Établissement où les personnes souffrant d'un trouble mental sont examinées, reçoivent des soins et suivent un traitement, et qui est désigné comme tel par les règlements. *"psychiatric facility"*

"évaluation psychiatrique" Évaluation que fait un médecin de l'état mental d'une personne en vertu de l'article 11. *"psychiatric assessment"*

"médecin" Médecin dûment qualifié. *"physician"*

"médecin traitant" Médecin responsable de l'examen du malade d'un établissement psychiatrique, des soins à lui donner et des traitements à lui fournir. *"attending physician"*

"ministre" Le ministre de (la Santé). *"Minister"*

"professionnel désigné de la santé" Membre d'une catégorie de professionnels de la santé, à l'exception des médecins, désignée dans les règlements. *"designated health professional"*

"psychiatre" Médecin dont le statut de spécialiste en psychiatrie est reconnu par le (conseil d'administration de la profession médicale de la compétence législative). *"psychiatrist"*

"patient advisor service" "service de conseillers des malades" Service ou organisme désigné comme tel par les règlements. Le terme "conseiller des malades" désigné un représentant ou un membre du personnel d'un tel service.

Remarque

L'article 20 prévoit un service éventuel de conseillers des malades qui recevra un avis de ce qui suit : la décision d'admettre la personne à titre de malade en cure obligatoire ou de changer son statut en celui de malade en cure obligatoire, le dépôt de chaque certificat de renouvellement à l'égard du malade en cure obligatoire, chaque rêquete présentée au conseil de révision à l'égard d'un tel malade, ainsi que chaque décision d'un médecin portant que le malade en cure obligatoire ne jouit pas de toutes ses facultés mentales. Ce service de conseillers des malades sera chargé de voir le malade, de lui expliquer ses droits et de l'aider à les exercer. Le service de conseillers des malades peut être un service public dans certains ressorts ou un organisme communautaire dans d'autres.

"related medical treatment" "traitement médical connexe" Procédure ou traitement médical nécessaire pour :

a) soit administrer, de façon sûre et efficace, le traitement psychiatrique;

b) soit contrôler les effets indésirables du traitement psychiatrique.

"mental disorder" "trouble mental" Trouble considérable de la pensée, de l'humeur, de la perception, de l'orientation ou de la mémoire qui nuit grandement au jugement ou au comportement ou qui affaiblit considérablement la faculté de reconnaître la réalité ou le pouvoir de faire face aux demandes ordinaires de la vie.

Remarque

Les critères en matière de cure obligatoire sont subordonnés à la constatation d'un trouble mental, dont la définition s'inspire de celle de la loi du Vermont dans ce domaine. Il est certes difficile de traduire la notion médicale de trouble mental en termes juridiques précis, mais la définition adoptée au Vermont semble avoir été bien accueillie par de nombreuses compétences.

(2) Pour les besoins du consentement prévu par la présente loi, une personne jouit de toutes ses facultés mentales si elle est capable de comprendre l'objet du consentement qu'on lui demande et les conséquences qui peuvent résulter du fait qu'elle donne ou refuse son consentement. Si le consentement a trait à un traitement proposé pour la personne, celle-ci jouit de toutes ses facultés mentales si elle est capable de comprendre la nature de sa maladie et du traitement proposé. *Aptitude mentale*

Remarque

Plusieurs dispositions de la loi permettent de prendre certaines mesures avec le consentment d'une personne. Par exemple, l'alinéa 25(1)a) permet qu'un traitement psychiatrique soit administré à un malade en cure obligatoire avec son consentement. Une personne qui ne jouit pas de toutes ses facultés mentales ne peut pas donner un consentement en connaissance de cause. Le paragraphe 1(2) a pour objet de préciser que la notion d'"aptitude mentale" a deux composantes. Premièrement, la personne doit être capable de comprendre l'objet du consentement qu'on lui demande. Deuxièmement, la personne doit être capable de comprendre les conséquences qui peuvent résulter du fait qu'elle donne ou refuse son consentement. Si le consentement a trait à un traitement proposé, le paragraphe 1(2) précise également que la composante "objet" de la notion d'aptitude mentale a deux facettes. La première comprend la nature de la maladie de la personne et la deuxième comprend la nature du traitement proposé.

2. Les objectifs de la présente loi sont les suivants : *Objectifs*

a) protéger les personnes de comportements dangereux qui résultent de troubles mentaux;

b) fournir un traitement aux personnes qui souffrent d'un trouble mental susceptible de se traduire par un comportement dangereux;

c) prévoir, si besoin est, l'examen forcé de personnes, leur garde, les soins et le traitement à leur donner et les moyens de les maîtriser qui constituent les mesures les moins contraignantes et les moins perturbatrices pour atteindre les objectifs précisés aux alinéas a) et b).

Remarque

L'article 2 vise à préciser les principaux objectifs de la loi. Une telle disposition peut quelquefois faciliter l'interprétation d'autres dispositions dans une loi. Les alinéas 2 a) et b) précisent que la loi vise, d'une part, à protéger les personnes de comportements dangereux qui résultent de troubles mentaux et, d'autre part, à fournir un traitement aux personnes qui souffrent d'un trouble mental susceptible de se traduire par un comportement dangereux. L'alinéa 2c) indique expressément qu'en vue d'atteindre ces objectifs, il peut être nécessaire, quelquefois, de prendre des mesures sans le consentement de la personne. L'alinéa précise que la loi a pour objet de prévoir, si besoin est, l'examen forcé de personnes, leur garde, les soins et le traitement à leur donner et les moyens de les maîtriser qui constituent les mesures les moins contraignantes et les moins perturbatrices pour atteindre les objectifs précisés aux alinéas 2 a) et b).

EXAMEN ET ÉVALUATION PSYCHIATRIQUES FORCÉS

Recommandation portant sur l'évaluation psychiatrique forcée

3.(1) Le médecin ou le professionnel désigné de la santé qui a examiné une personne peut recommander que celle-ci subisse une évaluation psychiatrique forcée s'il est d'avis que la personne souffre apparemment d'un trouble mental et que l'une des deux conditions suivantes existe également :

1. Le médecin ou le professionnel désigné de la sante a des motifs valables de croire que par suite de son trouble mental, la personne, selon le cas :

   (i) menace ou tente de s'infliger des lésions corporelles ou a récemment menacé ou tenté de le faire,

   (ii) se comporte avec violence envers une autre personne ou s'est récemment comportée de telle façon,

   (iii) se comporte de manière à faire craindre à une autre personne qu'elle lui causera des lésions corporelles ou s'est récemment comportée de telle façon,

et il est d'avis que par suite de son trouble mental, la personne s'infligera probablement ou infligera probablement à une autre personne des lésions corporelles graves.

2. Le médecin ou le professionnel désigné de la santé a des motifs valables de croire que par suite de son trouble mental, la personne fait preuve ou a récemment fait preuve de son incapacité de prendre soin d'elle-même et il est d'avis que par suite de son trouble mental, la personne souffrira probablement d'un affaiblissement physique imminent et grave.

Contenu de la recommandation

(2) La recommandation est rédigée selon la formule prescrite par les règlements. Le médecin ou le professionnel désigné de la santé qui la signe :

a) y précise ce qui suit :

(i) le fait qu'il a examiné lui-même la personne qui fait l'objet de la recommandation,

(ii) la date à laquelle il a examiné cette personne,

(iii) le fait qu'il s'est sérieusement renseigné sur tous les faits nécessaires pour se faire une opinion sur la nature et la gravité du trouble mental de la personne,

(iv) les motifs de la recommandation, y compris les faits sur lesquels il fonde son opinion sur la nature et la gravité du trouble mental de la personne et ses conséquences probables;

b) y établit une distinction entre les faits qu'il a observés lui-même et ceux qui lui ont été communiqués par d'autres.

Signature

(3) La recommandation n'est valide que si le médecin ou le professionnel désigné de la santé la signe dans les sept jours qui suivent l'examen.

Remarque

La loi confère au médecin le pouvoir de décider le premier s'il y a lieu de soumettre une personne à une évaluation dans un établissement psychiatrique en vue de son admission éventuelle à titre de malade en cure obligatoire. Elle prévoit également qu'il est possible que quelques compétences désirent désigner d'autres professionnels de la santé, en plus de médecins, pour prendre cette décision.

Le paragraphe 3(1) énumère les conditions préalables à la recommandation, par le médecin ou le professionnel désigné de la santé, d'une évaluation psychiatrique. En premier lieu, le médecin ou le professionnel désigné de la santé doit être d'avis que la personne souffre apparemment d'un trouble mental. Deuxièmement, il doit avoir des motifs valables de croire que, par suite de son trouble mental, la personne a déjà manifesté soit une tendance à s'infliger ou à infliger à autrui des lésions corporelles soit l'incapacité de prendre soin d'elle-même. Troisièmement, le médecin ou le professionnel désigné de la santé doit être d'avis que, par suite de son trouble mental, la personne risque de s'infliger ou d'infliger à autrui des lésions corporelles graves ou de souffrir d'un affaiblissement physique imminent et grave.

Le critère des lésions corporelles graves vise le cas des personnes activement dangereuses pour elles-mêmes ou pour autrui. Le critère de l'affaiblissement physique imminent et grave vise le cas des personnes qui ne sont peut-être pas activement dangereuses mais qui, en s'abstenant de prendre soin d'elles-mêmes, se détériorent de façon passive.

Une preuve objective de manifestations récentes du trouble mental est nécessaire à cette étape afin de justifier l'envoi du malade à un établissement psychiatrique pour qu'il y fasse l'objet d'une évaluation et d'un examen professionnels plus approfondis en vertu de l'alinéa 10 c).

Une fois convaincu, à la lumière des critères ci-dessus, qu'il y a lieu de recommander une évaluation psychiatrique, le médecin ou le professionnel désigné de la santé est tenu, en vertu du paragraphe 3(2), de remplir une formule sur laquelle il indique de façon détaillée les motifs de sa recommandation.

4.(1) Quiconque peut faire une déclaration écrite sous serment ou une affirmation solennelle devant un (juge ou fonctionnaire judiciaire qui reçoit les dénonciations) dans laquelle il demande qu'une ordonnance relative à l'examen forcé d'une autre personne par un médecin ou un professionnel désigné de la santé soit rendue et précise les motifs de cette demande. Le (juge) reçoit la déclaration. *Ordonnance d'examen (du juge)*

(2) Le (juge) qui reçoit la déclaration l'étudie et, s'il le juge souhaitable, il entend et étudie, sans préavis, les allégations de la personne qui a fait la déclaration et les témoignages des témoins, le cas échéant. *Procédure*

(3) Le (juge) peut, au moyen d'une ordonnance, exiger l'examen forcé d'une personne par un médecin ou un professionnel désigné de la santé s'il a des motifs valables de croire que la personne souffre apparemment d'un trouble mental et qu'elle ne consentira pas à se faire examiner par un médecin ou un professionnel désigné de la santé et que l'une des deux conditions suivantes existe également : *Ordonnance*

1. Par suite de son trouble mental, la personne, selon le cas :

   (i) menace ou tente de s'infliger des lésions corporelles ou a récemment menacé ou tenté de le faire,

   (ii) se comporte avec violence envers une autre personne ou s'est récemment comportée de telle façon,

   (iii) se comporte de manière à faire craindre à une autre personne qu'elle lui causera des lésions corporelles ou s'est récemment comportée de telle façon,

   et elle s'infligera probablement ou infligera probablement à une autre personne des lésions corporelles graves.

2. Par suite de son trouble mental, la personne fait preuve ou a récemment fait preuve de son incapacité de prendre soin d'elle-même et

souffrira probablement d'un affaiblissement physique imminent et grave.

Idem (4) Si le (juge) estime qu'aucune circonstance précisée au paragraphe (3) n'a été établie, il inscrit une mention à cet effet sur la déclaration.

Ordonnance à l'intention de la police (5) L'ordonnance rendue en vertu du paragraphe (3) et autorisant l'examen forcé d'une personne par un médecin ou un professionnel désigné de la santé exige de l'une ou de plusieurs des personnes suivantes :

a) l'agent d'un corps de police nommé dans l'ordonnance;

b) la personne nommée dans l'ordonnance;

c) la personne appartenant à une catégorie précisée dans l'ordonnance ou désignée dans les règlements,

qu'elles détiennent sous garde la personne nommée ou décrite dans l'ordonnance et l'amènent sans délai dans un lieu où elle peut être détenue afin de subir un examen forcé.

Durée de validité (6) L'ordonnance rendue en vertu du paragraphe (3) est valide pendant sept jours, y compris le jour où elle est rendue.

Remarque

La loi confère au médecin ou au professionnel désigné de la santé le pouvoir de décider le premier s'il y a lieu de faire une évaluation psychiatrique, pouvoir qu'il peut exercer, par exemple, si quelqu'un vient se soumettre librement à son examen.

Toutefois, si une personne ne se soumet pas librement à l'examen d'un médecin ou d'un professionnel désigné de la santé, il faut prévoir un mécanisme pour l'y forcer. L'article 4 instaure une procédure permettant à un officier judiciaire d'ordonner que quelqu'un se soumette à un examen. Cette procédure n'a pas pour objet de décider si les conditions relatives à l'évaluation psychiatrique proprement dite sont remplies. Il s'agit tout simplement d'amener l'intéressé devant une personne qui possède le pouvoir de décider s'il y a

lieu de recommander une évaluation psychiatrique. Cette procédure s'apparente donc au fait de décerner un mandat.

Avant de rendre l'ordonnance obligeant quelqu'un à se soumettre à un examen forcé, l'officier judiciaire est tenu, en vertu de l'article 4, d'avoir des motifs valables de croire à l'existence de critères semblables à ceux que prévoit l'article 3.

Agent de police

5 Un agent de police peut détenir une personne sous garde et l'amener sans délai dans un lieu où elle sera examinée contre son gré par un médecin ou un professionnel désigné de la santé si l'agent de police a des motifs valables de croire que la personne souffre apparemment d'un trouble mental, qu'elle ne consentira pas à se faire examiner par un médecin ou un professionnel désigné de la santé, qu'il n'est pas possible dans les circonstances de présenter une requête à un (juge ou fonctionnaire judiciaire qui reçoit les dénonciations) afin qu'une ordonnance autorisant l'examen forcé de la personne par un médecin ou un professionnel désigné de la santé soit rendue et que l'une des deux conditions suivantes existe également :

1. L'agent de police a des motifs valables de croire que par suite de son trouble mental, la personne, selon le cas :

   (i) menace ou tente de s'infliger des lésions corporelles ou a récemment menacé ou tenté de le faire,

   (ii) se comporte avec violence envers une autre personne ou s'est récemment comportée de telle façon,

   (iii) se comporte de manière à faire craindre à une autre personne qu'elle lui causera des lésions corporelles ou s'est récemment comportée de cette faéon,

   et il est d'avis que par suite de son trouble mental, la persone s'infligera probablement ou infligera probablement à une autre personne des lésions corporelles graves.

2. L'agent de police a des motifs valables de croire que par suite de son trouble mental, la personne fait preuve ou a récemment fait preuve de son incapacité de prendre soin d'elle-même et il est d'avis que par suite de son trouble mental, la personne souffrira probablement d'un affaiblissement physique imminent et grave.

Remarque

L'article 5 prévoit un autre mécanisme permettant d'amener quelqu'un devant un médecin ou un professionnel désigné de la santé en vue de l'examen prévu à l'article 3. Un agent de police peut amener une personne devant un médecin ou un professionnel désigné de la santé si les conditions analogues à celles de l'article 3 sont remplies. L'agent ne peut cependant exercer ce pouvoir que s'il est impossible dans les circonstances de présenter une requête à un officier judiciaire en vue d'obtenir l'ordonnance prévue à l'article 4. Par exemple, en cas d'incident violent à un moment ou dans un lieu où on ne peut pas trouver facilement un officier judiciaire, l'article 5 permet à l'agent de police d'amener directement la personne pour qu'elle subisse un examen.

Moment de l'examen

6.(1) Quand une personne est amenée sous garde afin d'être examinée contre son gré par un médecin ou un professionnel désigné de la santé en vertu de la présente loi, l'examen a lieu dès l'arrivée de la personne au lieu de l'examen.

Lieu de l'examen

(2) Dans la mesure du possible, le lieu de l'examen est un établissement psychiatrique ou un autre lieu approprié où sont fournis des soins et des traitement médicaux.

Remarque

Si une personne est amenée sous garde en vue de l'examen médical forcé visé à l'article 4 ou 5, le paragraphe 6(1) exige que l'examen se tienne dès l'arrivée de cette personne au lieu de l'examen. L'article 6 prescrit aussi que, dans la mesure du possible, l'examen ait lieu dans un établissement psychiatrique ou un autre lieu approprié où sont fournis des soins et des traitements médicaux où il existe plus de chances de trouver le personnel spécialisé et l'équipement nécessaire.

(7) Si le (directeur de la santé mentale ou un fonctionnaire occupant un poste équivalent dans la compétance législative) a des motifs valables de croire qu'une personne qui est un malade en cure obligatoire dans un établissement psychiatrique situé à l'extérieur de (compétence législative) peut venir en (compétence législative) ou y être amenée et que le (directeur) a des motifs valables de croire que les conditions préalables précisées au paragraphe 11(1) en ce qui concerne l'admission à titrre de malade en cure obligatoire sont susceptibles d'être remplies, il peut ordonner que cette personne soit amenée dans un établissement psychiatrique afin d'y subir une évaluation psychiatrique forcée.

Malade en cure obligatoire venant d'une autre compétence législative

Remarque

La recommendation faite par un médecin ou un professionnel désigné de la santé en vertu de l'article 3 constitue le principal moyen d'amener une personne dans un établissement psychiatrique en vue d'une évaluation psychiatrique proprement dit. L'article 7 prévoit une autre procédure à laquelle on peut avoir recours lorsqu'il s'agit d'un malade en cure obligatoire d'un établissement situé dans un autre ressort qui réussit à entrer dans la compétence législative. Dans ce cas, l'article 7 donne au directeur de la santé mentale ou à un autre fonctionnaire exerçant des fonctions analogues le pouvoir d'ordonner que cette personne soit amenée directement dans un établissement psychiatrique afin d'y subir une évaluation psychiatrique forcée. Cette ordonnance ne peut être rendue que s'il semble probable que les conditions prévues au paragraphe 11(1) en ce qui concerne l'admission à titre de malade en cure obligatoire seront remplies.

8.(1) L'agent de police ou la personne qui détient une personne sous garde afin qu'elle soit examinée contre son gré par un médecin ou un professionnel désigné de la santé ou qu'elle subisse un examen psychiatrique forcé en vertu de la présente loi l'informe promptement :

Obligation d'informer

a) du lieu où elle est amenée;

b) du fait qu'elle est amenée afin d'être examinée contre son gré par un médecin ou un professionnel désigné de la santé ou afin de subir une évaluation psychiatrique forcée, selon le cas, et des raisons qui motivent cet examen;

c) du droit qu'elle a d'avoir recours sans délai à l'assistance d'un avocat.

Renseignements donnés à la famille

(2) L'agent de police ou la personne qui détient une personne sous garde à l'une des fins prévues au paragraphe (1) fait tout son possible pour veiller à ce que le parent le plus proche de la personne soit informé, le plus tôt possible, du fait que la personne est détenue sous garde, des motifs de la détention et du lieu où la personne est détenue ou amenée.

Renseignements donnés au lieu de l'examen

(3) Dès l'arrivée de la personne au lieu de l'examen ou de l'évaluation psychiatrique forcée et, à nouveau, dès que, par la suite, la personne semble jouir de toutes ses facultés mentales et être en mesure de comprendre ces renseignements, le responsable du lieu veille à ce que la personne soit promptement informée :

a) du lieu où elle est détenue;

b) du motif de sa détention;

c) du droit qu'elle a d'avoir recours sans délai à l'assistance d'un avocat.

Remarque

Si une personne est amenée devant un médecin ou un professionnel désigné de la santé en vue d'un premier examen (conformément à l'article 4 ou 5) ou dans un établissement psychiatrique afin de subir une évaluation psychiatrique forcée (conformément à la recommandation prévue à l'article 3 our à l'ordonnance prévue à l'article 7), le paragraphe 8(1) exige que cette personne soit informée du lieu où elle est amenée des raisons qui motivent cette mesure et de son droit d'avoir recours sans délai à l'assistance d'un avocat. Le paragraphe 8(3) stipule que ces renseignements lui soient communiqués de nouveau dès son arrivée au lieu de l'examen ou de l'évaluation psychiatrique. Ces dispos-

itions visent à garantir que les personnes soumises contre leur gré à un examen ou à une évaluation psychiatrique soient informées très tôt de leur droit de se faire assister par un avocat.

À titre de précaution supplémentaire, le paragraphe 8(2) exige que des efforts soient faits en vue d'aviser un proche que la personne est détenue sous garde. Le membre de la famille est également informé des motifs de la détention et du lieu où la personne est détenue ou amenée.

Fonction de l'agent de police lors de l'examen

9.(1) L'agent de police ou la personne qui détient une personne sous garde afin qu'elle soit amenée et examinée contre son gré par un médecin ou un professionnel désigné de la santé ou afin qu'elle soit amenée à un établissement psychiatrique reste au lieu de l'examen ou à l'établissement et conserve la responsabilité de la garde de cette personne jusqu'à ce que l'examen soit terminé ou jusqu'à ce que les autorités de l'établissement psychiatrique acceptent de s'en charger, selon le cas.

Obligation de ramener la personne

(2) Si une personne est amenée à un établissement psychiatrique ou à un autre établissement de santé afin d'être examinée contre son gré par un médecin ou un professionnel désigné de la santé ou afin d'y subir une évaluation psychiatrique forcée et qu'on décide de ne pas recommander l'évaluation psychiatrique forcée de la personne ou de ne pas l'admettre à titre de malade de l'établissement psychiatrique, selon le cas, le responsable de l'établissement psychiatrique ou de l'autre établissement de santé informe promptement la personne qu'elle peut quitter l'établissement et, sauf indication contraire de la personne, il prend des dispositions pour la ramener au lieu où elle a été détenue sous garde ou, à la demande de la personne, à un autre lieu approprié et assume les coûts de ce déplacement.

Remarque

Le paragraphe 9(1) a pour objet de veiller à ce que, si quelqu'un est amené dans un lieu afin d'y subir, contre son gré, un examen ou une évaluation psychiatrique, la per-

sonne qui l'amène reste dans ce lieu jusqu'à ce que sa présence ne soit plus nécessaire. Par exemple, si un agent de police amène une personne à un hôpital désigné comme établissement psychiatrique afin qu'elle subisse une évaluation psychiatrique, le paragraphe 9(1) a pour objet de veiller à ce que l'agent n'abandonne pas la personne à la salle d'urgence pour s'en aller aussitôt. Le paragraphe exige que l'agent reste à l'hôpital jusqu'à ce que les autorités de l'hôpital acceptent de se charger de la personne.

Le paragraph 9(2) traite du cas où une personne est amenée à un établissement psychiatrique ou à un autre établissement de santé afin d'y subir, contre son gré, un examen ou une évaluation psychiatrique et qu'on décide de ne pas recommander l'évaluation psychiatrique ou de ne pas admettre la personne à titre de malade, selon le cas. Le paragraphe exige que l'établissement prenne des dispositions pour ramener la personne au lieu où elle a été détenue sous garde ou à un autre lieu approprié, sauf indication contraire de la personne.

Évaluation psychiatrique forcée

10. La recommandation du médecin ou du professionnel désigné de la santé ou l'ordonnance rendue en vertu de la présente loi par le (directeur de la santé mentale ou un fonctionnaire occupant un poste équivalent dans la compétence législative) relativement à l'évaluation psychiatrique forcée d'une personne constituent une autorisation suffisante pour :

a) permettre à un agent de police ou à une autre personne de détenir la personne sous garde le plus tôt possible, mais au plus tard sept jours à compter du jour où la recommandation est signée ou l'ordonnance rendue, y compris ce jour, et de l'amener à un établissement psychiatrique le plus tôt possible;

b) détenir, maîtriser et mettre en observation la personne dans un établissement psychiatrique pendant au plus quarante-huit heures;

c) permettre à un médecin, de préférence un psychiatre, d'examiner la personne et d'évaluer son état mental aux fins de l'article 11.

Remarque

Deux methodes sont prévues pour amener une personne à un établissement psychiatrique en vue de son évaluation psychiatrique. La recommandation du médecin ou du professionnel désigné de la santé, prévue à l'article 3, constitue la principale méthode; quant à la seconde, il s'agit de l'ordonnance rendue par le directeur de la santé mentale en vertu de l'article 7, dans le cas d'un malade en cure obligatoire qui vient d'une autre compétence. L'autorisation donnée par la recommandation prévue à l'article 3 ou par l'ordonnance prévue à l'article 7 est définie à l'article 10. En premier lieu, la recommandation ou l'ordonnance autorise tout agent de police ou toute autre personne à détenir la personne sous garde le plus tôt possible (mais au plus tard sept jours à compter de la date de la recommandation ou de l'ordonnance). Une fois sous garde, la personne doit être amenée le plus tôt possible à un établissement psychiatrique. En deuxième lieu, la recommandation ou l'ordonnance permet de détenir, de maîtriser et de mettre en observation l'intéressé dans cet établissement psychiatrique pendant quarante-huit heures au plus. Enfin, elle permet à un médecin, de préférence un psychiatre, d'examiner la personne à l'établissement psychiatrique et d'évaluer son état mental.

La loi limite à quarante-huit heures la période pendant laquelle une personne peut être détenue dans un établissement psychiatrique par suite de la recommandation prévue à l'article 3 ou de l'ordonnance prévue à l'article 7 sans qu'elle y ait été admise à titre de malade en cure obligatoire. Cette limitation vise à concilier le principe d'un minimum d'entraves à la liberté de la pesonne et la nécessité d'un délai suffisant pour faire une évaluation minutieuse et circonspecte de son état mental.

Il y a lieu de noter qu'il n'est pas nécessaire que l'évaluation de l'état mental de la personne soit effectuée dans tous les cas par un psychiatre. Même si le recours aux psychiatres est éminemment souhaitable, cette mesure n'est pas possible dans les petites agglomérations ou les régions éloignées où il n'y a pas de psychiatres. Aussi la loi prévoit-elle que l'évaluation peut être effectuée par n'importe quel médecin, bien qu'un psychiatre soit préférable.

MALADE EN CURE OBLIGATOIRE

Admission en cure obligatoire

11.(1) Le médecin qui a examiné une personne dans un établissement psychiatrique et qui a évalué son état mental peut l'admettre à titre de malade en cure obligatoire de l'établissement psychiatrique en remplissant et en déposant auprès du dirigeant responsable un certificat d'admission en cure obligatoire sur la formule prescrite par les règlements si les conditions suivantes sont réunies :

a) il est d'avis que la personne souffre d'un trouble mental qui, à moins qu'elle ne reste sous la garde des autorités d'un établissement psychiatrique, aura probablement l'une des conséquences suivantes :

(i) elle s'infligera ou infligera à une autre personne des lésions corporelles graves,

(ii) elle souffrira d'un affaiblissement physique imminent et grave;

b) il est d'avis qu'il ne convient pas d'admettre la personne à titre de malade en cure volontaire.

Obligation du médecin, admission en cure volontaire

(2) Le médecin qui a examiné une personne dans un établissement psychiatrique et qui a évalué son état mental peut l'admettre à titre de malade en cure volontaire de l'établissement psychiatrique s'il est d'avis qu'elle souffre d'un trouble mental, qu'elle a besoin du traitement psychiatrique fourni dans un établissement psychiatrique et qu'il convient de l'admettre à titre de malade en cure volontaire.

Obligation du médecin, congé

(3) Le médecin qui a examiné une personne dans un établissement psychiatrique, qui a évalué son état mental et qui est d'avis que les conditions préalables précisées dans le présent article en ce qui concerne l'admission à titre de malade en cure obligatoire ou volontaire ne sont pas remplies donne son congé à la personne, sous réserve de toute détention légalement autorisée autrement qu'en vertu de la présente loi.

Idem

(4) Un médecin qui remplit la recommandation relative

à l'évaluation psychiatrique forcée d'une personne ne doit pas remplir le certificat d'admission en cure obligatoire de cette personne.

(5) Si, après quarante-huit heures de détention, la personne n'a pas, le cas échéant : *Congé après 48 heures*

a) été admise à l'établissement psychiatrique à titre de malade en cure obligatoire en vertu du paragraphe (1) ou de malade en cure volontaire en vertu du paragraphe (2);

b) obtenu son congé d'un médecin en vertu du paragraphe (3),

le dirigeant responsable veille à ce que la personne soit promptement informée du droit qu'elle a de quitter l'établissement psychiatrique, sous réserve de toute détention légalement autorisée autrement qu'en vertu de la présente loi.

(6) Le médecin qui signe le certificat d'admission en cure obligatoire : *Contenu du certificat*

a) y précise ce qui suit :

(i) le fait qu'il a examiné lui-même la personne qui fait l'objet du certificat,

(ii) la ou les dates auxquelles il a examiné cette personne,

(iii) son opinion sur la nature et la gravité du trouble mental de la personne,

(iv) son diagnostic, même provisoire, sur le trouble mental de la personne,

(v) les motifs du certificat, y compris les faits sur lesquels il fonde son opinion sur la nature et la gravité du trouble mental de la personne et ses conséquences probables;

b) y établit une distinction entre les faits qu'il a observés lui-même et ceux qui lui ont été communiqués par d'autres.

Remarque

Le paragraphe 11(1) prévoit les conditions d'admission

d'une personne en cure obligatoire. Celles-ci sont semblables à celles prévues à l'article 3 en ce qui concerne la recommandation d'une évaluation psychiatrique. En particulier, le médecin doit être d'avis que la personne souffre d'un trouble mental qui, à moins qu'elle ne reste sous la garde des autorités d'un établissement psychiatrique, pourrait l'amener à s'infliger ou à infliger à autrui des lésions corporelles graves, ou encore à souffrir d'un affaiblissement physique imminent et grave. À la différence des conditions prévues à l'article 3 cependant, l'admission en cure obligatoire n'est pas subordonnée à la preuve d'un comportement dû au trouble mental. Ceci s'explique par la disposition de l'article 10 qui permet de maîtriser la personne détenue dans un établissement psychiatrique en vue d'une évaluation psychiatrique. Les cas où il est permis de maîtriser la personne sont énumérés en détail à l'article 27. Une fois maîtrisé, il se peut que l'intéressé ne manifeste pas, pendant l'évaluation, son comportement habituel. Il se peut par exemple que les crises violentes soient supprimées. Il n'est donc pas nécessaire, pour l'admission en cure obligatoire, d'exiger la preuve d'actes récents.

Les paragraphes 11(2) et (3) prévoient, respectivement, l'admission en cure volontaire et l'obligation pour le médecin de donner congé à la personne s'il est d'avis que les conditions préalables à l'admission en cure obligatoire ou volontaire ne son pas remplies (à moins que la personne ne soit détenue à un autre titre comme, par exemple, en application du *Code criminel*). Le paragraphe 11(5) dispose expressément que si la personne n'a pas été admise à titre de malade en cure obligatoire ou volontaire ou que le médecin ne lui a pas donné congé après quarante-huit heures, la personne a le droit de quitter l'établissement psychiatrique, à moins qu'elle n'y soit détenue à un autre titre.

En vertu du paragraphe 11(4), le médecin qui fait la recommandation d'évaluation psychiatrique forcée, prévue à l'article 3, ne remplit pas le certificat d'admission en cure obligatoire. Cette disposition vise à assurer la participation de deux personnes différentes avant l'admisison en cure obligatoire.

Le paragraphe 11(6) prévoit que le médecin qui signe le certificat d'admission en cure obligatoire y indique de façon

détaillée les motifs sur lesquels il se fonde. Cette disposition exige expressément du médecin qu'il précise son diagnostic (même provisoire). La disposition s'apparente au paragraphe 3(2) aux autres égards.

Nouveau statut le malade en cure volontaire devient malade en cure obligatoire

12. Après avoir examiné le malade en cure volontaire et évalué son état mental, le médecin traitant peut changer le statut de ce malade en celui de malade en cure obligatoire en remplissant et en déposant auprès du dirigeant responsable un certificat d'admission en cure obligatoire qui satisfait aux exigences du paragraphe 11(6), si les conditions préalables précisées au paragraphe 11(1) en ce qui concerne l'admission à titre de malade en cure obligatoire sont remplies.

Remarque

L'article 12 prévoit un mécanisme qui permet de changer le statut d'un malade en cure volontaire en celui de malade en cure obligatoire. Ce changement ne peut avoir lieu que si le malade satisfait aux conditions d'admission en cure obligatoire, prévues au paragraphe 11(1). Par exemple, un tel changement pourrait survenir si la personne devenait, volontairement, un malade d'un établissement psychiatrique, mais décidait par la suite de partir. L'article 12 permettrait, aussi longtemps que la personne satisfait aux conditions d'admission en cure obligatoire, de changer le statut du malade en celui de malade en cure obligatoire.

Personne détenue en vertu du Code criminel *(Canada) S.R.C. 1970, chap. C-34*

13. Si une personne a été détenue en vertu du *Code criminel* (Canada) parce qu'elle est inapte à subir son procès, visée par un verdict de non-responsabilité criminelle pour cause de désordre mental ou non coupable pour cause d'aliénation mentale et que sa détention en vertu du *Code criminel* (Canada) est sur le point d'expirer, un médecin, de préférence un psychiatre, dont les services sont retenus par un établissement psychiatrique ou qui fait partie du personnel, peut, si les conditions préalables précisées au paragraphe 11(1) en ce qui concerne l'admission à titre de malade en cure obligatoire sont remplies, l'examiner, évaluer son état mental et l'admettre à titre de malade en cure obligatoire de

13. l'établissement psychiatrique en remplissant et en déposant auprès du dirigeant responsable un certificat d'admisison en cure obligatoire qui satisfait aux exigences du paragraphe 11(6).

Remarque

L'article 13 a trait aux propositions fédérales visant à modifier le *Code criminel* pour fixer la période maximale pendant laquelle une personne jugée inapte à subir son procès ou visée par un verdict de non-responsabilité criminelle pour cause de désordre mental peut être détenue en vertu de la loi fédérale. Si ces propositions sont adoptées, il est prévu qu'elles s'appliqueraient également aux personnes qui, par le passé, étaient déclarées non coupables pour cause d'aliénation mentale. Ces propositions présupposent l'existence d'un mécanisme dans la législation provinciale en matière de cure obligatoire qui permet l'admission en cure obligatoire de personnes violentes qu'on ne saurait détenir en vertu de la législation pénale. L'article 13 autorise l'évaluation psychiatrique d'une personne sur le point d'être libérée conformément aux propositions relatives au *Code criminel*, et son admission à titre de malade en cure obligatoire si les conditions d'admission en cure obligatoire sont remplies.

Nouvelle évaluation certificat de renouvellement

14.(1) Le médecin traitant examine le malade et évalue son état mental peu de temps avant l'expiration du certificat d'admission en cure obligatoire ou du certificat de renouvellement. De plus, il peut renouveler le statut du malade à titre de malade en cure obligatoire en remplissant et en déposant auprès du dirigeant responsable un certificat de renouvellement, si les conditions préalables précisées au paragraphe 11(1) en ce qui concerne l'admission à titre de malade en cure obligatoire sont remplies.

Congé

(2) Si le médecin traitant ne renouvelle pas le statut du malade à titre de malade en cure obligatoire, il l'informe promptement du droit qu'il a de quitter l'établissement psychiatrique, sous réserve de toute détention légalement autorisée autrement qu'en vertu de la présente loi.

(3) Le paragraphe 11(6), qui a trait au contenu du certificat d'admission en cure obligatoire, s'applique, avec les adaptations nécessaires, à l'égard d'un certificat de renouvellement. *Contenu du certificat*

(4) Le délai autorisé pour détenir, maîtriser, mettre en observation et examiner dans un établissement psychiatrique un malade en cure obligatoire ne dépasse pas : *Durée du certificat*

a) deux semaines, dans le cas d'un certificat d'admission en cure obligatoire;

b) ni :

(i) un mois supplémentaire, dans le cas d'un premier certificat de renouvellement,

(ii) deux mois supplémentaires, dans le cas d'un deuxième certificat de renouvellement,

(iii) trois mois supplémentaires, dans le cas d'un troisième certificat de renouvellement ou d'un certificat ultérieur.

Remarque

L'article 14 permet le renouvellement du certificat d'admission en cure obligatoire tant que les conditions de cette admission, prévues au paragraphe 11(1), sont remplies. Le paragraphe 14(4) fixe la période de validité du certificat d'admission, initial et renouvelé. Étant donné qu'un grand nombre d'admissions en établissement psychiatrique porte sur des périodes relativement courtes, la loi fixe des périodes qui requièrent de plus nombreuses évaluations de l'état du malade dès le début de l'hospitalisation.

Le paragraphe 14(3) prévoit que le certificat de renouvellement contient les mêmes détails que le certificat d'admission en cure obligatoire pour ce qui est des motifs du renouvellement.

15.(1) Dès le dépôt du certificat d'admission en cure obligatoire ou du certificat de renouvellement, le dirigeant responsable examine le certificat pour s'assurer qu'il a été remplie en conformité avec la présente loi. *Examen du certificat*

Devoir d'informer certaines personnes

(2) Si, selon le dirigeant responsable, le certificat n'a pas été substantiellement rempli en conformité avec la présente loi, avant l'expiration de la période de détention autorisée, le dirigeant responsable veille à ce que le médecin ou le médecin traitant en soit informé.

Remarque

Le médecin est tenu d'indiquer, avec une certaine précision, sur le certificat d'admission en cure obligatoire comme sur le certificat de renouvellement, les motifs sur lesquels il se fonde pour les délivrer. Les dispositions prévues en la matière visent à assurer un dossier clair de la décision du médecin et à favoriser des évaluations minutieuses et circonspectes. L'expérience acquise en ce domaine montre qu'il est souhaitable de prévoir un contrôle administratif des formules remplies par le médecin afin de s'assurer qu'elles contiennent tous les renseignements requis par la loi. C'est précisément ce contrôle administratif que prévoit l'article 15. S'il ressort du contrôle qu'un certificat n'a pas été substantiellement remplie conformément à la loi, et avant l'expiration de la période de détention autorisée par la loi, le médecin en sera informé.

Nouveau statut : le malade en cure obligatoire devient malade en cure volontaire

16.(1) Le malade en cure obligatoire dont la période de détention autorisée a pris fin est réputé un malade en cure volontaire

Idem

(2) Si le médecin traitant est d'avis, à n'importe quel moment :

a) d'une part, que les conditions préalables précisées au paragraphe 11(1) en ce qui concerne l'admission à titre de malade en cure obligatoire ne sont plus remplies;

b) d'autre part, que les conditions préalables précisées au paragraphe 11(2) en ce qui concerne l'admission à titre de malade en cure volontaire sont remplies.

il doit, en remplissant et en déposant auprès du dirigeant responsable un certificat de changement de statut, changer le statut du malade en cure obligatoire en celui de malade en cure volontaire.

(3) Si le statut du malade change ou est changé de sorte que ce dernier devient un malade en cure volontaire, le dirigeant responsable veille à ce que le malade soit promptement informé du fait qu'il possède le statut de malade en cure volontaire et du droit qu'il a de quitter l'établissement psychiatrique, sous réserve de toute détention légalement autorisée autrement qu'en vertu de la présente loi. *Obligation d'informer*

Remarque

L'article 16 permet que le statut d'un malade en cure obligatoire soit changé en celui de malade en cure volontaire si les conditions d'admission en cure volontaire, prévues au paragraphe 11(2), sont remplies et que les conditions d'admission en cure obligatoire, prévues au paragraphe 11(1), ne le sont plus. Ce changement peut être effectué en tout temps.

17. S'il appert au (directeur de la santé mentale ou à un fonctionnaire occupant un poste équivalent dans la compétence législative), selon le cas : *Transfert d'un malade dans un établissement situé hors de (compétence législative)*

a) qu'un malade en cure obligatoire qui se trouve dans un établissement psychiatrique vient de l'extérieur de (compétence législative) ou a été amené en (compétence législative) et que son hospitalisation relève d'une autre compétence législative;

b) qu'il serait dans l'intérêt d'un malade en cure obligatoire qui se trouve dans un établissement psychiatrique qu'il soit hospitalisé dans une autre compétence législative et que le malade consent à son transfert dans cette autre compétence,

et que le (directeur) a pris des dispositions pour que le malade soit hospitalisé dans cette autre compétence, il peut, au moyen d'une ordonnance, autoriser le transfert du malade dans cette autre compétence.

Remarque

L'article 17 habilite le directeur de la santé mentale (ou un autre fonctionnaire exerçant des fonctions analogues) à ordonner, dans deux cas, le transfert hors de la province d'un

malade en cure obligatoire d'un établissement psychiatrique. Le premier cas est celui du malade qui vient d'une autre compétence et dont l'hospitalisation semble relever de cette dernière. Dans le deuxième cas, le transfert se fait avec le consentement du malade s'il semble être dans l'intérêt véritable du malade.

Renseignements sur le statut du malade

18.(1) Le médecin qui admet un malade en cure obligatoire ou qui remplit et dépose un certificat de renouvellement ou un certificat de changement de statut en celui de malade en cure obligatoire informe promptement le malade, par écrit, de ce qui suit :

a) le malade a été admis à titre de malade en cure obligatoire, son statut de malade en cure obligatoire a été renouvelé ou son statut a été changé en celui de malade en cure obligatoire, selon le cas, de l'établissement psychiatrique, et le médecin donne les motifs de cette décision;

b) le malade a le droit de demander au conseil de révision, au moyen d'une requête, de réviser son statut;

c) le malade a le droit d'avoir recours sans délai à l'assistance d'un avocat.

Idem

(2) Si, lors de l'admission ou du renouvellement, le malade est apparemment incapable de comprendre les renseignements mentionnés au paragraphe (1), le médecin donne ces renseignements par écrit à une personne qui serait capable de donner ou de refuser le consentement au nom du malade en vertu de l'article 24, ou il fait des efforts raisonnables pour donner ces renseignements à une telle personne.

Remarque

En vertu de l'article 18, le médecin qui admet un malade en cure obligatoire ou qui dépose un certificat de renouvellement ou un certificat de changement de statut en celui de malade en cure obligatoire doit promptement informer le malade, par écrit, de la décision prise, des motifs de cette décision, du droit du malade d'en demander la révision et de son droit d'avoir recours sans délai à l'assistance d'un avocat. Cette disposition vise à garantir que le malade soit promptement informé de ses droits en vertu de la loi.

Cet article prévoit également la notification de ces renseignements à la personne habilitée à prendre des décisions au nom du malade si ce dernier est apparemment incapable, au moment de son admission ou au dépôt du certificat de renouvellement, de comprendre les renseignements donnés.

Décisionnaire suppléant

19.(1) Le malade d'un établissement psychiatrique qui a au moins seize ans et qui jouit de toutes ses facultés mentales pour ce faire a le droit de nommer par écrit une personne qui prend des décisions, pour l'application de la présente loi, en son nom pendant qu'il est un malade en cure obligatoire.

Avis du médecin

(2) Le médecin qui admet un malade à un établissement psychiatrique ou qui change le statut d'un malade en cure volontaire en celui de malade en cure obligatoire informe promptement le malade, par écrit, du droit dont celui-ci dispose en vertu du paragraphe (1).

Contenu de l'avis

(3) L'avis du médecin est rédigé selon la formule prescrite par les règlements et informe le malade des obligations du dirigeant responsable en vertu du présent article et des pouvoirs et responsabilités de la personne nommée pour prendre des décisions, pour l'application de la présente loi, au nom du malade.

Nomination

(4) Si le malade donne ou transmet au dirigeant responsable une déclaration écrite par laquelle il nomme une personne chargée de prendre des décisions, pour l'application de la présente loi, en son nom, le dirigeant responsable envoie sans délai une copie de cette déclaration à la personne.

Révocation

(5) Le malade qui a nommé une personne chargée de prendre des décisions, pour l'application de la présente loi, en son nom, peut, par écrit, révoquer cette nomination et nommer une autre personne pendant qu'il jouit de toutes ses facultés mentales pour ce faire. Le paragraphe (4) s'applique, avec les adaptations nécessaires, à l'égard de la révocation et de la nouvelle nomination.

Avis

(6) Le dirigeant responsable veille à ce que la personne nommé en vertu du paragraphe (1) reçoive un avis de ce qui suit :

a) la décision d'admettre le malade ou de changer son statut;

b) le dépôt de chaque certificat de renouvellement à l'égard du malade;

c) chaque requête présentée au conseil de révision à l'égard du malade;

d) la décision d'un médecin portant que le malade ne jouit pas de toutes ses facultés mentales.

Droit d'accès

(7) La personne chargée de prendre des décisions, pour l'application de la présente loi, au nom d'un malade a le droit, à toute heure convenable, de rencontrer le malade et de discuter avec lui.

Remarque

L'article 19 prévoit qu'à son admission à un établissement psychiatrique, le malade ait la possibilité de nommer une personne qui agira à titre de décisionnaire suppléant. L'article 24 de la loi prévoit que des décisions soient prises par une autre personne au nom du malade qui ne jouit pas de toutes ses facultés mentales pour ce faire. L'article 19 exige que toutes les décisions importantes visant le malade soient communiquées au décisionnaire suppléant afin que celui-ci soit tenu au courant du statut du malade et soit en mesure de l'aider.

(Service de conseillers des malades

20.(1) Le lieutenant-gouverneur en conseil (ou l'autorité équivalente dans la compétence législative) peut, par règlements, désigner un service ou un organisme à titre de service de conseillers des malades.

Devoir du service de conseillers des malades

(2) Il incombe au service de conseillers des malades d'aider et de conseiller les malades en cure obligatoire d'établissements psychiatriques et de fournir des conseillers chargés de rencontrer les malades en cure obligatoire qui désirent obtenir leur aide et leurs conseils, de discuter avec eux, et de les conseiller et de les aider.

(3) Le dirigeant responsable veille à ce que le service de conseillers des malades reçoive un avis de ce qui suit : *Avis au service de conseillers des malades*

a) chaque décision d'admettre un malade en cure obligatoire à un établissement psychiatrique;

b) chaque décision de changer le statut d'un malade en cure volontaire en celui de malade en cure obligatoire ou vice-versa;

c) le dépôt de chaque certificat de renouvellement à l'égard d'un malade en cure obligatoire;

d) chaque requête présentée au conseil de révision à l'égard d'un malade en cure obligatoire;

e) chaque décision d'un médecin portant qu'un malade en cure obligatoire ne jouit pas de toutes ses facultés mentales.

(4) Le conseiller des malades a le droit, à toute heure convenable, de rencontrer un malade en cure obligatoire dans un établissement psychiatrique et de discuter avec lui.) *Droit d'accès*

Remarque

L'article 20, qui est facultatif, prévoit l'existence d'un service de conseillers des malades qui sera avisé de toutes les décisions importantes touchant un malade en cure obligatoire. Ce service de conseillers des malades sera chargé de voir le malade, de lui expliquer ses droits et de l'aider à les exercer. Le service de conseillers des malades peut être un service public dans certains ressorts ou un organisme communautaire dans d'autres.

RÉVISION

21.(1) À la suite d'une requête, le conseil de révision révise promptement le statut du malade pour déterminer si les conditions préalables précisées au paragraphe 11(1) en ce qui concerne l'admission à titre de malade en cure obligatoire : *Révision de l'admission ou du renouvellement*

a) étaient remplies lorsque le certificat d'admission ou le certificat de renouvellement, selon le cas, a été déposé à l'égard du malade;

b) sont toujours remplies lors de l'audition de la requête.

Ordonnance de confirmation

(2) Le conseil de révision peut, au moyen d'une ordonnance, confirmer le statut du malade à titre de malade en cure obligatoire s'il détermine que les conditions préalables précisées au paragraphe 11(1) en ce qui concerne l'admission à titre de malade en cure obligatoire :

a) étaient remplies lorsque le certificat a été déposé et l'étaient toujours lors de l'audition de la requête;

b) n'étaient pas remplies lorsque le certificat a été déposé, maids l'étaient lors de l'audition de la requête.

Ordonnance d'annulation

(3) Le conseil de révision annule, au moyen d'une ordonnance, le certificat s'il détermine que les conditions préalables précisées au paragraphe 11(1) en ce qui concerne l'admission à titre de malade en cure obligatoire :

a) n'étaient pas remplies lorsque le certificat a été déposé et ne l'étaient toujours pas lors de l'audition de la requête;

b) étaient remplies lorsque le certificat a été déposé, mais ne l'étaient plus lors de l'audition de la requête.

Application de l'ordonnance

(4) L'ordonnance du conseil de révision confirmant ou annulant un certificat s'applique au certificat d'admission en cure obligatoire ou au certificat de renouvellement qui sont en vigueur immédiatement avant que l'ordonnance soit rendue.

Remarque

En vertu de l'article 21, il est possible de demander au conseil de révision d'étudier impartialement si une personne réunit les conditions d'admission à titre de malade en cure obligatoire. Conformément au paragraphe 33(2), la requête peut être présentée par le malade ou par toute autre personne ayant un intérêt sérieux dans la question.

22.(1) Au dépôt du quatrième certificat de renouvellement et au dépôt de chaque deuxième certificat de renouvellement subséquent, le malade est réputé avoir demandé au conseil de révision, au moyen d'une requête, de réviser son statut pour déterminer si les conditions préalables précisées au paragraphe 11(1) en ce qui concerne l'admission à titre de malade en cure obligatoire étaient toujours remplies lorsque le certificat a été déposé et si elles l'étaient toujours lors de l'audition de la requête. *Révision à intervalles de six mois*

(2) Dans le cadre de la révision, le conseil de révision prend des dispositions pour qu'un deuxième médecin, de préférence un psychiatre, examine le malade, et obtient son avis en ce qui concerne la question de déterminer si les conditions préalables précisées au paragraphe 11(1) relativement à l'admission à titre de malade en cure obligatoire sont toujours remplies lors de l'audition de la requête. *Deuxième avis*

Remarque

L'article 22 prévoit qu'au dépôt du quatrième certificat de renouvellement et au dépôt de chaque deuxième certificat de ce genre par la suite, le malade est réputé avoir demandé au conseil de révision de réviser son statut de malade en cure obligatoire. Cette disposition vise à faire en sorte que l'état du malade soit impartialement révisé une fois tous les six mois environ, même si le malade ne s'oppose pas au dépôt des cetificats de renouvellement.

Étant donné que la révision d'office aura lieu même sans la participation active du malade, le paragraphe 22(2) oblige le conseil de révision à obtenir l'avis d'un second médecin sur la question de savoir si les conditions d'admission en cure obligatoire sont remplies. L'avis de ce second médecin constituera une preuve lors de l'audience. Le conseil de révision aura ainsi à sa disposition une preuve impartiale sur l'état mental du malade.

APTITUDE À DONNER UN CONSENTEMENT

23.(1) Le médecin qui est d'avis qu'un malade en cure obligatoire ne jouit pas de toutes ses facultés mentales pour ce qui est de donner son consentement à *Avis du médecin au sujet de l'aptitude mentale*

l'une des fins prévues en vertu de la présente loi remplit et dépose auprès du dirigeant responsable un certificat à cet effet.

Certificat relatif à une autre personne

(2) Le médecin qui est d'avis qu'une personne qui n'est pas un malade en cure obligatoire ne jouit pas de toutes ses facultés mentales pour ce qui est de donner son consentement à l'une des fins prévues en vertu de la présente loi remplit, seulement à la demande de cette personne, et dépose auprès du dirigeant responsable un certificat à cet effet.

Raisons

(3) Le médecin donne par écrit, dans le certificat, les raisons qui motivent son avis.

Avis

(4) Le dirigeant responsable remet au malade en cure obligatoire ou à l'autre personne une copie du certificat ainsi qu'un avis écrit portant que le malade ou l'autre personne ont le droit de demander au conseil de révision d'étudier l'avis du médecin s'ils remettent au conseil un avis écrit à cet effet.

Conséquences d'une requête

(5) Si une requête est présentée au conseil de révision pour qu'il étudie l'avis d'un médecin selon lequel un malade en cure obligatoire jouit ou ne jouit pas de toutes ses facultés mentales pour donner son consentement, ni un médecin ni le dirigeant responsable ne donne suite à l'avis jusqu'à l'issue de la requête.

Conséquences de la conclusion d'un tribunal ou du conseil de révision

(6) La conclusion d'un tribunal ou du conseil de révision portant qu'un malade en cure obligatoire jouit ou ne jouit pas de toutes ses facultés mentales ne s'applique qu'aux fins pour lesquelles l'instance est tenue.

Remarque

L'article 23 prévoit une marche à suivre si le médecin est d'avis qu'une personne ne jouit pas de toutes ses facultés mentales pour ce qui est de donner un consentement requis par la loi. Cette marche à suivre comprend le dépôt auprès du dirigeant responsable d'un certificat motivé de son avis. Une copie du certificat doit être communiquée à la personne considérée comme ne jouissant pas de toutes ses facultés mentales, de même qu'un avis l'informant qu'elle a le droit

de demander au conseil de révision d'étudier l'avis du médecin. Si un requête est présentée au conseil de révision, aucune suite n'est donnée à l'avis du médecin jusqu'à l'issue de la requête. Cet article prévoit également que la conclusion d'un tribunal ou du conseil de révision en ce qui concerne l'aptitude mentale ne s'applique qu'aux fins sur lesquelles porte l'instance. Cela tient compte du fait que l'aptitude mentale d'une personne peut changer.

Consentement au nom du malade

24.(1) Quiconque a atteint l'âge de seize ans, jouit apparemment de toutes ses facultés mentales, et est disponible et prêt à prendre la décision de donner ou de refuser de donnner son consentement peut donner ou refuser un consentement, pour l'application de la présente loi, au nom d'un malade en cure obligatoire d'un établissement psychiatrique qui n'a pas atteint l'âge de seize ans ou qui ne jouit pas de toutes ses facultés mentales. La personne qui donne un consentement au nom d'une autre personne doit appartenir à l'une des catégories suivantes :

1. Le tuteur du malade nommé par un tribunal compétent.

2. La personne nommée en vertu de la présente loi pour prendre des décisions au nom du malade.

3. Une personne qui vit avec le malade dans une union conjugale.

4. L'enfant du malade, le père ou la mère du malade ou une personne qui est légitimement en droit de remplacer le père our la mère du malade.

5. Le frère ou la soeur du malade.

6. Un autre parent du malade.

Refus

(2) Si une personne appartenant à une catégorie énumérée au paragraph (1) refuse le consentement au nom du malade, le consentement d'une personne appartenant à une catégorie subséquente n'est pas valide.

Préférence

(3) Si deux personnes ou plus qui ne sont pas décrites dans la même disposition du paragraphe (1) préten-

dent avoir le droit de donner ou de refuser un consentement en vertu de ce paragraphe, la personne appartenant à la catégorie qui figure en premier possède ce droit.

Consentement d'un parent

(4) La personne visée aux dispositions 3 à 6 du paragraphe (1) n'exerce pas le droit que lui confère ce paragraphe si elle ne remplit pas les conditions suivantes :

a) elle a été en contract personnel avec le malade au cours des douze mois précédents;

b) elle est prête à assumer la responsabilité de donner ou de refuser son consentement;

c) elle n'est au courant d'aucun conflit ni d'aucune objection d'une autre personne figurant sur la liste apparaissant au paragraphe (1), qui appartient à une catégorie égale ou supérieure et qui prétend avoir le droit de prendre la décision;

d) elle fait une déclaration par écrit attestant le lien qui existe entre elle et le malade et les faits et convictions précisés aux alinéas a) à c).

Raisons motivant le consentement donné au nom d'un malade

(5) La personne autorisée en vertu du paragraphe (1) à donner un consentement au nom d'un malade doit, si les volontés du malade, exprimées lorsqu'il jouissait de toutes ses facultés mentales et qu'il avait seize ans ou plus, sont clairement connues, donner ou refuser son consentement conformément aux volontés du malade. Dans le cas contraire, la personne agit dans l'intérêt véritable du malade.

Intérêt véritable du malade

(6) Afin d'établir l'intérêt véritable du malade en ce qui concerne le traitement psychiatrique et l'autre traitement médical connexe précis, il faut tenir compte de ce qui suit :

a) la question de savoir si le traitement psychiatrique précis permettra ou permettra probablement d'améliorer dans une grande mesure l'état mental du malade;

b) la question de savoir si l'état mental du malade s'améliorera ou s'améliorera probablement s'il ne suite pas le traitement psychiatrique précis;

c) la question de savoir si les avantages prévus du traitement psychiatrique et de l'autre traitement médical connexe précis l'emportent sur le risque d'effets néfastes sur le malade;

d) la question de savoir si le traitement psychiatrique précis est le traitement le moins contraignant et le moins perturbateur qui satisfait aux exigences des alinéas a), b) et c).

Droit de se fier à la déclaration

(7) Quiconque cherche à obtenir le consentement d'une personne au nom d'un malade a le droit de se fier à la déclaration écrite de cette personne en ce qui concerne son lien avec le malade et les faits et convictions précisés aux alinéas (4) a) à c), à moins qu'il ne soit pas raisonnable de croire cette déclaration.

Démarches raisonnables

(8) Quiconque cherche à obtenir le consentement n'est pas tenu responsable de ne pas avoir demandé le consentement d'une personne qui a le droit de donner ou de refuser le consentement au nom du malade, si la personne qui cherche à obtenir le consentement a fait des démarches raisonnables en vue de trouver des personnes qui ont le droit de donner ou de refuser le consentement et que ces démarches ont été vaines.

Remarque

L'article 24 prévoit une marche à suivre grâce à laquelle un consentement peut être donné au nom du malade en cure obligatoire qui n'a pas atteint l'âge de seize ans ou qui ne jouit pas de toutes ses facultés mentales. Cet article énumère les personnes qui peuvent donner ce consentement, la priorité étant accordée au tuteur nommé par le tribunal, suivi du décisionnaire suppléant que peut nommer le malade en vertu de l'article 19. S'il n'y a ni tuteur ni décisionnaire suppléant nommé, la liste prévoit des parents de divers degrés du malade. Quiconque entend exercer le droit de prendre des décisions au nom du malade, à l'exception du tuteur nommé par un tribunal ou du décisionnaire suppléant nommé par le malade, doit faire une déclaration écrite attestant son lien avec le malade et indiquant qu'il a été en

contact personnel avec le malade au cours des douze mois précédents, qu'il et disposé à assumer la responsabilité de prendre la décision, et qui'il n'est au courant d'aucun conflit ni d'aucune objection de la part d'une autre personne figurant sur la liste et qui a, au même degré ou à un degré supérieur, le droit de prendre une décision au nom du malade.

Les paragraphes 24(5) et (6) visent à clarifier la responsabilité du décisionnaire suppléant. Aux termes de ces paragraphes, si les volontés du malade, exprimées lorsqu'il jouissait de toutes ses facultés mentales et qu'il avait seize ans ou plus, sont clairement connues, celui qui prend une décision au nom du malade doit donner ou refuser son consentement conformément à ces volontés. Si les volontés du malade ne sont pas clairement connues, le décisionnaire suppléant doit donner ou refuser son consentement dans l'intérêt véritable du malade. Le paragraphe 24(6) énumère des points particuliers dont il faut tenir compte afin d'établir l'intérêt véritable du malade en ce qui concerne le traitement psychiatrique et l'autre traitement médical connexe précis.

L'article 24 contient aussi des dispositions visant à faciliter les démarches du médecin pour trouver un décisionnaire suppléant. Le médecin a le droit de se fier à la déclaration écrite de l'intéressé quant à son lien avec le malade, à moins qu'il ne soit pas raisonnable de croire cette déclaration. De même, le médecin n'est pas tenu responsable de ne pas avoir demandé le consentement d'une personne qui a le droit de prendre une décision au nom du malade si, malgré des démarches raisonnables, il n'a pas réussi à trouver une telle personne.

TRAITEMENT

Traitement

25.(1) Le malade en cure obligatoire d'un établissement psychiatrique a le droit de ne pas recevoir un traitement psychiatrique ou un autre traitement médical sauf si :

a) il a donné son consentement;

b) un consentement a été donné en son nom conformément à l'article 24;

c) une ordonnance du conseil de révision autori-

sant l'administration d'un traitement psychiatrique et d'un autre traitement médical connexe précis a été rendue.

Traitement médical urgent

(2) Un traitement médical peut être administré, sans son consentement, à un malade en cure obligatoire d'un établissement psychiatrique qui, selon un médecin, ne jouit pas de toutes ses facultés mentales ou a moins de seize ans si le médecin a des motifs raisonnables et probables de croire qu'un danger imminent et sérieux qui nécessite un traitement médical immédiat menace la vie du malade ou un de ses membres ou organes vitaux.

Objection du malade

(3) Si le médecin traitant est d'avis qu'un malade en cure obligatoire ne jouit pas de toutes ses facultés mentales et ne peut pas, par conséquent, consentir à un traitement psychiatrique ou à un autre traitement médical connexe précis et qu le malade s'objecte au traitement, ce traitement n'est pas administré conformément à un consentement donné par une personne décrite aux dispositions 3 à 6 du paragraphe 24(1), à moins qu'un deuxième médecin ne partage l'avis du premier médecin en ce qui concerne l'aptitude mentale du malade.

Remarque

Le paragraphe 25(1) prévoit pour le malade en cure obligatoire le droit de ne pas recevoir de traitement psychiatrique ou médical sans son consentement, un consentement donné en son nom ou une ordonnance du conseil de révision.

L'article 24 énumère les cas où un consentement peut être donné au nom du malade. En vertu du paragraphe 25(3), si le médecin traitant est d'avis que le malade ne jouit pas de toutes ses facultés mentales et ne peut pas, par conséquent, donner son consentement et qu'il s'oppose au traitement, un consentement donné par une autre personne que le tuteur nommé par un tribunal ou le décisionnaire suppléant nommé par le malade ne suffit pas pour autoriser ce traitement, à moins qu'un second médecin ne partage l'avis du premier en ce qui concerne l'aptitude mentale du malade.

L'article 26 prévoit les cas où le conseil de révision peut

rendre une ordonnance autorisant un traitement psychiatrique et un autre traitement médical connexe précis.

Le paragraphe 25(2) prévoit qu'un traitement médical peut être administré, sans son consentement, à un malade en cure obligatoire qui ne jouit pas de toutes ses facultés mentales ou qui a moins de seize ans, si un danger imminent et grave qui nécessite un traitement médical immédiat menace la vie du malade ou un de ses membres ou organes vitaux.

Requête présentée au conseil de révision

26.(1) Le médecin traitant d'un malade en cure obligatoire peut demander au conseil de révision, au moyen d'une requête, de rendre une ordonnance autorisant l'administration d'un traitement psychiatrique et d'un autre traitement médical connexe précis au malade si, selon le cas :

a) le malade ou la personne qui agit au nom du malade en vertu de l'article 24 a refusé de consentir au traitement psychiatrique ou à l'autre traitement médical connexe précis;

b) personne n'est disponible pour donner ou refuser le consentement au nom du malade en vertu de l'article 24 et le malade a moins de seize ans ou ne jouit pas apparemment de toutes ses facultés mentales pour donner le consentement;

c) deux personnes ou plus décrites dans la même disposition du paragraphe 24(1) prétendent avoir le droit de donner ou de refuser le consentement au nom du malade et ne sont pas du même avis.

Documents joints à la requête

(2) Le conseil de révision n'étudie pas la requête à moins que n'y soient jointes les déclarations signées du médecin traitant et d'un psychiatre qui n'est pas membre du corps médical de l'établissement psychiatrique dans lesquelles chacun affirme qu'ils ont examiné le malade et qu'ils sont d'avis, en donnant les raisons qui les motivent, que :

a) le traitement psychiatrique précis permettra ou permettra probablement d'améliorer dans une grande mesure l'état mental du malade;

b) l'état mental du malade ne s'améliorera pas ou risque de ne pas s'améliorer si ce dernier ne suit pas le traitement psychiatrique précis;

c) les avantages prévus du traitement psychiatrique et de l'autre traitement médical connexe précis pour le malade l'emportent sur le risque d'effets néfastes qu'il court;

d) le traitement psychiatrique et l'autre traitement médical connexe précis sont les traitements les moins contraignants et les moins perturbateurs qui satisfont aux exigences des alinéas a), b) et c).

Raisons motivant la décision du conseil de révision

(3) Le conseil de révision peut, au moyen d'une ordonnance, autoriser l'administration du traitement psychiatrique et d'un autre traitement médical connexe précis s'il est convaincu de ce qui suit :

a) le traitement psychiatrique précis permettra ou permettra probablement d'améliorer dans une grande mesure l'état mental du malade;

b) l'état mental du malade ne s'améliorera pas ou risque de ne pas s'améliorer si ce dernier ne suit pas le traitement psychiatrique précis;

c) les avantages prévus du traitement psychiatrique et de l'autre traitement médical connexe précis pour le malade l'emportent sur le risque d'effets néfastes qu'il court;

d) le traitement psychiatrique et l'autre traitement médical connexe précis sont les traitements les moins contraignants et les moins perturbateurs qui satisfont aux exigences des alinéas a), b) et c).

Conditions

(4) L'ordonnance peut comprendre des conditions et préciser la durée de sa validité.

Remarque

L'article 26 permet au médecin traitant d'un malade en cure obligatoire de demander au conseil de révision, au moyen d'une requête, de rendre une ordonnance autorisant un traitement psychiatrique et un autre traitement médical

connexe précis dans trois cas. Le premier cas est celui où le malade, ou la personne autorisée par l'article 24 à prendre une décision en son nom, ne consent pas au traitement. Dans le deuxième cas, personne n'est disponible pour prendre la décision au nom du malade et celui-ci a moins de seize ans ou ne jouit pas apparemment de toutes ses facultés mentales pour donner le consentement. Le troisième cas est celui où plusieurs personnes de qualité égale prétendent avoir le droit de prendre une décision au nom du malade. C'est le cas par exemple où deux enfants du malade prétendent l'un et l'autre avoir le droit de prendre une décision au nom du malade, mais n'arrivent pas à s'entendre sur la décision à prendre.

La requête en vue d'obtenir une ordonnance du conseil de révision portant autorisation du traitement doit être étayée des déclarations du médecin traitant et d'un psychiatre qui ne fait pas partie du corps médical de l'établissement psychiatrique dans lesquelles chacun affirme, avec les motifs à l'appui, que le traitement psychiatrique précis permettra ou permettra probablement d'améliorer dans une grande mesure l'état mental du malade, que cet état ne s'améliorera pas ou risque de ne pas s'améliorer sans le traitement psychiatrique précis, que les avantages prévus du traitement l'emportent sur le risque d'effets néfastes, et que le traitement envisagé est celui que est le moins contraignant et le moins perturbateur, compte tenu des prescriptions de la loi. Le conseil de révision ne peut autoriser le traitement psychiatrique et un autre traitement médical connexe précis que s'il est convaincu que l'avis des deux médecins est correct.

MOYENS DE MAÎTRISER LA PERSONNE

Moyens de maîtriser la personne

27.(1) L'autorisation qu'accorde la présente loi de maîtriser une personne constitue une autorisation pour garder la personne sous contrôle grâce à l'utilisation minimale de la force, des moyens mécaniques ou des substances chimiques qui sont nécessaires, compte tenu de l'état physique et mental de la personne, pour l'empêcher de s'infliger des lésions ou d'en infliger à une autre personne.

(2) Les mesures nécessaires relatives à l'autorisation de maîtriser une personne peuvent être prises sans le consentement de cette personne. Toutefois, ces mesures doivent faire l'objet d'une mention détaillée dans le dossier clinique des soins et des traitements fournis à la personne à l'établissement psychiatrique. Doivent être également consignés dans ce dossier le fait que la personne a été maîtrisée, une description des moyens utilisés à cette fin, la période pendant laquelle la personne a été maîtrisée et une description du comportement qui a exigé la prise ou le maintien de cette décision. *Idem*

(3) Si une substance chimique est utilisée, la mention doit comprendre le nom de cette substance, le mode d'administration et la posologie. *Substance chimique*

Remarque

L'alinéa 10 b) permet qu'une personne soit maîtrisée pendant sa détention aux fins d'une évaluation psychiatrique forcée. Le paragraphe 14(4) permet qu'une personne soit maîtrisée durant sa période de cure obligatoire. L'article 27 spécifie les conditions de la contrainte, à savoir qu'elle vise à maîtriser la personne pour l'empêcher de s'infliger ou d'infliger à autrui des lésions, par un recours minimal à la force, à des moyens mécaniques ou à des substances chimiques, compte tenu de l'état physique et mental de la personne. En outre, les mesures prises pour maîtriser la personne doivent être consignées en détail dans son dossier clinique.

CERTIFICAT D'AUTORISATION

28.(1) En vue de fournir un traitement psychiatrique moins contraignant et moins perturbateur que la détention dans un établissement psychiatrique, le médecin traitant d'un malade en cure obligatoire peut délivrer un certificat d'autorisation permettant au malade de vivre à l'extérieur de l'établissement psychiatrique sous réserve de conditions écrites particulières en ce qui concerne le traitement. *Autorisation de vivre à l'extérieur de l'établissement*

(2) Le certificat d'autorisation est sans effet sans le consentement du malade. *Consentement*

Statut du malade

(3) Les dispositions de la présente loi en ce qui concerne un malade en cure obligatoire continuent de s'appliquer à l'égard d'un malade visé par un certificat d'autorisation.

Annulation

(4) Le médecin traitant peut, au moyen d'un certificat d'annulation de l'autorisation, annuler sans préavis le certificat d'autorisation en cas de manquement à une condition ou s'il est d'avis que le traitement précisé dans le certificat d'autorisation n'est pas efficace.

Retour à l'établissement psychiatrique

(5) Le certificat d'annulation de l'autorisation constitue pour un agent de police, pendant un mois après qu'il est signé, une autorisation suffisante pour détenir sous garde la personne qui y est nommée et l'amener sans délai à un établissement psychiatrique.

Révision

(6) À la suite d'une requête, le conseil de révision révise le statut du malade en vue d'établir s'il y a eu manquement à une condition particulière écrite du certificat d'autorisation ou si le traitement précisé dans le certificat d'autorisation n'a pas été efficace.

Ordonnance

(7) Le conseil de révision peut, au moyen d'une ordonnance, confirmer ou annuler le certificat d'annulation de l'autorisation.

Validité du certificat

(8) Le certificat d'annulation de l'autorisation reste en vigueur jusqu'à ce que le conseil de révision rende son ordonnance.

Remarque

L'article 28 prévoit pour le malade qui remplit les conditions d'admission en cure obligatoire et qui serait autrement détenu dans un établissement psychiatrique la possibilité de suivre un traitement qui lui permet de continuer à vivre à l'extérieur. Il est prévu que cette autorisation favoriserait un traitement moins contraignant et moins perturbateur que la détention dans un établissement psychiatrique. Cet article précise que le certificat d'autorisation que délivre le médecin traitant est subordonné au consentement du malade, qui décide ainsi en dernier ressort s'il préfère rester dans

l'établissement plutôt que de se conformer aux conditions du traitement pendant son séjour autorisé à l'extérieur.

La délivrance du certificat d'autorisation n'a pas pour effet d'invalider le certificat d'admission en cure obligatoire ou le certificat de renouvellement. Autrement dit, l'état mental du malade continuera à faire l'objet d'évaluations périodiques et si, à un moment donné, il ne remplit plus les conditions d'admission en cure obligatoire, il sera libéré du contrôle de l'établissement psychiatrique. Par ailleurs, la délivrance du certificat d'autorisation ne porte pas atteinte au droit du malade de contester devant le conseil de révision le certificat d'admission en cure obligatoire ou le certificat de renouvellement.

L'article 28 autorise le médecin traitant à annuler le certificat d'autorisation si le malade manque à l'une de ses conditions ou si le médecin est d'avis que le traitement indiqué dans le certificat d'autorisation n'est pas efficace. Il est cependant possible pour le malade de contester devant le conseil de révision l'annulation de son certificat d'autorisation.

DIVULGATION

Accès du malade au dossier clinique

29.(1) Quiconque a seize ans et jouit de toutes ses facultés mentales a le droit d'examiner le dossier clinique, ou une copie de ce dossier, qui se rapporte à l'examen, à l'évaluation, aux soins et au traitement qu'il reçoit ou a reçus dans un établissement psychiatrique, et d'en faire des copies.

Obligation du dirigeant responsable

(2) Sous réserve du paragraphe (3), le dirigeant responsable donne à la personne accès au dossier clinique.

Requête présentée au conseil de révision

(3) Dans les sept jours qui suivent le moment où la personne demande d'examiner le dossier clinique, le dirigeant responsable peut, au moyen d'une requête, demander au conseil de révision d'autoriser que toute ou partie du dossier clinique ne soit pas divulgué.

Ordonnance du conseil de révision

(4) À la suite de la requête, le conseil de révision examine le dossier clinique. Il ordonne au dirigeant re-

sponsable de donner à la personne accès au dossier clinique, à moins qu'il ne soit d'avis que la divulgation du dossier risque de nuire gravement au traitement ou à la guérison de la personne pendant qu'elle est un malade ou de causer des maux affectifs ou physiques graves à un autre personne.

Idem

(5) Si le conseil de révision est d'avis que la divulgation d'une partie du dossier clinique aura probablement une des conséquences décrites au paragraphe (4), il marque ou enlève cette partie et l'exclut du champ d'application de l'ordonnance.

Observations

(6) La personne et le dirigeant responsable ont tous deux le droit de présenter, en l'absence de l'autre, des observations au conseil de révision avant que celui-ci prenne sa décision.

Droit de faire des corrections

(7) Si la personne a le droit d'examiner, en tout ou en partie, le dossier clinique ou une copie du dossier, elle possède également les droits suivants :

a) demander que des corrections soient apportées aux renseignements qui figurent dans le dossier, si elle croit que celui-ci comporte une erreur ou une omission;

b) exiger qu'une déclaration de désaccord précisant la correction qui est demandée mais qui n'est pas effectuée soit annexée au dossier clinique;

c) demander qu'un avis de la modification ou de la déclaration de désaccord soit donné aux personnes ou aux organismes à qui le dossier clinique a été divulgué au cours de l'année qui précède la demande de la modification ou de la déclaration de désaccord.

Remarque

L'article 29 pose le principe selon lequel quiconque a plus de seize ans et jouit de toutes ses facultés mentales a le droit d'examiner le dossier clinique de l'examen, de l'évaluation, des soins et du traitement dont il a été l'objet dans un établissement psychiatrique, et d'en faire des copies.

Cet article habilite cependant le dirigeant responsable de l'établissement psychiatrique à demander au conseil de révision, au moyen d'une requête, l'autorisation de ne pas divulguer des renseignements à la personne. Le conseil peut rendre une ordonnance à cet effet s'il est d'avis que la divulgation risque de nuire gravement au traitement ou à la guérison du malade, ou encore de causer des maux affectifs ou physiques graves à un tiers. Une fois la requête présentée, le malade et le dirigeant responsable ont chacun le droit de présenter, l'un en l'absence de l'autre, des observations au conseil de révision, puisque les arguments en faveur du refus de divulguer le dossier supposent nécessairement la divulgation du contenu du dossier.

Le paragraphe 29(7) prévoit que la personne qui a examiné son dossier clinique peut demander que des corrections y soient apportées si elle pense y avoir relevé des erreurs ou des omissions; il prévoit également qu'une déclaration de désaccord est annexée au dossier pour indiquer toute correction qui est demandée mais qui n'est pas effectuée. De plus, le malade peut demander que toute correction ou déclaration de désaccord soit communiquée aux personnes ou organismes auxquels le dossier clinique a été divulgué au cours de l'année précédente.

Divulgation de renseignements

30.(1) Nul ne divulgue de renseignements au sujet de l'état mental d'une autre personne qui est ou a été un malade d'un établissement psychiatrique ou au sujet des soins ou du traitement qu'une telle personne reçoit ou a reçus.

Renseignements

(2) Le paragraphe (1) s'applique aux renseignements que la personne a obtenus, selon le cas :

a) au cours de l'évaluation du malade ou au cours des soins ou du traitement fournis au malade;

b) au cours de son emploi dans l'établissement;

c) d'une personne, qui les a obtenus de la façon décrite à l'alinéa a) ou b);

d) d'un dossier, notamment d'un dossier clinique, conservé par l'établissement.

Demande du malade

(3) Malgré le paragraphe (1), le dirigeant responsable peut divulguer des renseignements à l'égard d'un

malade ou d'un ancien malade à la demande de ce malade ou de cet ancien malade ou à la demande d'une autre personne, avec le consentement du malade ou de l'ancien malade.

Cas où la divulgation est permise

(4) Malgré le paragraphe (1), le dirigeant responsable peut divulguer des renseignements, selon le cas :

a) avec un consentement donné au nom du malade, conformément à l'article 24;

b) à des fins de recherche, d'enseignement ou de compilation de données statistiques;

c) au dirigeant responsable d'un établissement psychiatrique ou d'un autre établissement de santé où le malade est transféré, admis ou dirigé.

Requête présentée au conseil de révision

(5) Si personne ne prétend avoir le droit de donner ou de refuser un consentement conformément à l'article 24 ou que deux personnes ou plus décrites dans la même disposition du paragraphe 24(1) prétendent avoir ce droit et ne sont pas du même avis, la personne qui cherche à obtenir le consentement peut présenter une requête au conseil de révision.

Ordonnance

(6) Si les volontés du malade, exprimées lorsqu'il jouissait de toutes ses facultés mentales et qu'il avait seize ans ou plus, sont clairement connues, le conseil de révision, au moyen d'une ordonnance, donne ou refuse son consentement conformément aux volontés du malade. Dans le cas contraire, le conseil de révision agit dans l'intérêt véritable du malade.

Idem

(7) Malgré le paragraphe (1), les renseignements peuvent être divulgués dans l'un des cas suivants :

a) aux fins de l'évaluation du malade dans l'établissement psychiatrique ou aux fins des soins ou du traitement qui lui sont fournis;

b) aux fins de l'évaluation de l'ancien malade dans un autre établissement de santé ou aux fins des soins ou du traitement qui lui sont fournis;

c) à un médecin qui est responsable des soins fournis au malade;

d) à une commission ou à un comité ou à l'avocat ou au mandataire d'une commission ou d'un comité d'un établissement de santé ou du corps dirigeant d'une science de la santé, aux fins d'une enquête sur les soins ou le traitement qu'un membre de la science de la santé a fournis, aux fins d'une évaluation de ces soins ou de ce traitement, ou aux fins d'une instance disciplinaire contre un membre de cette science de la santé;

e) au conseil de révision aux fins d'une audience;

f) conformément à une loi;

g) à un tribunal à des fins d'examen en vertu du présent article;

h) conformément à une ordonnance d'un tribunal rendue en vertu du présent article.

Sursis à la divulgation

(8) Si le conseil de révision est saisi d'une requête portant sur la révision d'une décision au sujet de l'aptitude mentale en ce qui concerne le consentement à une divulgation proposée, le divulgation n'a pas lieu tant que la question n'a pas été définitivement réglée.

Divulgation à des fins de recherche

(9) La personne à qui des renseignements sont divulgués en vertu du paragraphe (4) à des fins de recherche, d'enseignement ou de compilation de données statistiques ne divulgue ni le nom du malade ni aucun autre moyen de l'identifier. Elle n'utilise ni ne communique ces renseignements qu'aux fins susmentionnées.

Divulgation à un tribunal

(10) Si la divulgation des renseignements mentionnés au paragraphe (1) est exigée dans une instance devant un tribunal, celui-ci peut, à la suite d'une motion, en ordonner la divulgation.

Divulgation à un tribunal administratif

(11) Si la divulgation des renseignements mentionnés au paragraphe (1) est exigée dans une instance devant

un tribunal administratif, le (tribunal compétent dans la compétence législative) peut, à la suite d'une requête, en ordonner la divulgation.

Examen par le tribunal

(12) Le tribunal peut examiner les renseignements sans les divulguer à la partie qui demande leur divulgation.

Observations

(13) La partie qui demande la divulgation de renseignements et le dirigeant responsable ont tous deux le droit de présenter, en l'absence de l'autre, des observations au tribunal avant que celui-ci rende sa décision.

Critère

(14) Si le tribunal st convaincu que la divulgation des renseignements risque de nuire gravement au traitement ou à la guérison de la personne pendant qu'elle est un malade ou de causer des maux physiques ou affectifs graves à une autre personne, il n'ordonne pas la divulgation à moins d'être convaincu que cette mesure est essentielle dans l'intérêt de la justice.

Infraction

31. Quiconque enfreint l'article 30 est coupable d'une infraction et passible, sur déclaration de culpabilité, d'une amende d'au plus ($).

Remarque

L'article 30 pose le principe général selon lequel nul ne doit divulguer des renseignements sur l'état mental d'un malade d'un établissement psychiatrique, ou sur les soins et le traitement que le malade y reçoit ou y a reçus, qu'il a obtenus au cours de son emploi dans l'établissement ou pendant qu'il fournissait des soins à ce malade. Cet article prévoit aussi les cas où la divulgation de renseignements est permise.

L'article 31 crée l'infraction qui consiste à contrevenir à l'article 30.

AUDIENCES ET APPELS

Conseils de révision

32.(1) Le lieutenant-gouverneur en conseil (ou l'autre autorité équivalente dans la compétence législative) peut constituer des conseils de révision pour des établissements ou groupes d'établissements psychiatriques.

(2) Le (lieutenant-gouverneur en conseil) peut nommer les membres de chaque conseil de révision. *Nomination des membres*

(3) Le (lieutenant-gouverneur en conseil) peut confier la présidence du conseil de révision à un des membres du conseil. *Présidence*

(4) Un comité se composant d'au moins trois membres d'un conseil de révision, y compris au moins un psychiatre, nommés par la personne placée à la présidence du conseil de révision, peut exercer l'ensemble des pouvoirs et des attributions du conseil de révision. *Comité*

(5) Une mention dans la présente loi d'un conseil de révision vise le conseil de révision qui a été constitué pour l'établissement psychiatrique dont relève l'affaire. *Compétence*

33.(1) Le conseil de révision peut être saisi d'une requête visant : *Requête présentée au conseil de révision*

a) la révision d'un certificat d'admission en cure obligatoire, d'un certificat de renouvellement ou d'un certificat d'annulation de l'autorisation;

b) l'autorisation de refuser de divulguer à une personne un dossier clinique, en tout ou en partie;

c) la révision de l'avis d'un médecin selon lequel une personne jouit ou ne jouit pas de toutes ses facultés mentales pour donner ou refuser son consentement;

d) l'autorisation d'administrer un traitement psychiatrique et un autre traitement médical connexe précis.

(2) Une requête peut être présentée par quiconque a un intérêt sérieux dans l'objet de la requête. *Requérant*

(3) Sont parties à la requête devant le conseil de révision le requérant, le malade et le médecin traitant. Le dirigeant responsable a le droit d'être une partie. *Parties*

(4) Si la requête porte sur l'autorisation d'administrer un traitement dans le cas où une personne a refusé, *Idem*

au nom du malade, de donner le consentement requis, cette personne est également une partie.

Idem (5) Le conseil de révision peut joindre à titre de partie quiconque a, selon le conseil, un intérêt sérieux dans la question qui fait l'objet de la révision.

Avis 34. Le conseil de révision donne un avis écrit de la requête à chaque partie, à chaque personne qui a le droit d'être une partie, et à quiconque peut, selon le conseil, avoir un intérêt sérieux dans la question qui fait l'objet de la révision.

Audience 35.(1) Chaque instance intentée devant le conseil de révision fait l'objet d'une audience.

Avocat (2) Lors de l'audience, chaque partie a le droit d'être représentée par son avocat ou son mandataire.

Examen de la preuve documentaire (3) Chaque partie doit avoir l'occasion d'examiner, avant l'audience, la preuve documentaire qui y sera produite et les rapports dont le contenu sera présenté en preuve, et d'en faire des copies.

Preuve (4) Chaque partie a le droit de présenter la preuve qui, selon le conseil de révision, est pertinente et celui d'interroger des témoins.

Obligation du conseil de révision (5) Il incombe au conseil de révision de s'informer pleinement de tous les faits au moyen de l'audience. Outre les témoins appelés et les documents produits par les parties, le conseil peut, à cette fin, assigner d'autres témoins et exiger la production d'autres documents.

Procès-verbal (6) Chaque instance devant le conseil de révision est consignée dans un procès-verbal. Des copies des documents déposés en preuve ou une transcription des témoignages oraux sont fournies uniquemenet aux parties, aux mêmes conditions que dans le (tribunal supérieur).

Huis clos (7) Sous réserve du paragraphe (8), toutes les audiences du conseil de révision sont tenues à huis clos.

Exception (8) Le conseil de révision permet que l'audience soit ouverte au public si les conditions suivantes sont réunies :

a) le malade y consent;

b) de l'avis du conseil, il y a peu de risques qu'une injustice ou un dommage sérieux soient causés à quiconque.

Appels

36.(1) Une partie à l'instance devant le conseil de révision peut interjeter appel de la décision ou de l'ordonnance définitives du conseil de révision devant le (tribunal compétent dans la compétence législative).

Pouvoirs du tribunal

(2) L'appel interjeté en vertu du présent article peut porter sur une question de droit ou de fait ou les deux. Le (tribunal) peut confirmer ou annuler la décision du conseil de révision et en exercer tous les pouvoirs. À cette fin, le (tribunal) peut substituer son opinion à celle du conseil de révision ou il peut renvoyer la question au conseil de révision pour qu'il l'entende à nouveau, en tout ou en partie, conformément aux directives que le (tribunal) juge appropriées.

Ordonnance provisoire

(3) Si la décision définitive du conseil de révision autorise un traitement psychiatrique et un autre traitement médical connexe précis, le (tribunal) peut, à la suite d'une motion, rendre une ordonnance provisoire autorisant l'administration du traitement psychiatrique et de l'autre traitement médical connexe précis jusqu'à ce qu'une décision définitive ait été rendue dans l'appel.

Norme de preuve

37. Dans une instance introduite en vertu de la présente loi devant un (juge ou fonctionnaire qui reçoit les déclarations), le conseil de révision ou un tribunal, la prépondérance des probabilités constitue la norme de preuve.

Le malade en cure obligatoire a un avocat

38. Dans une instance devant le conseil de révision ou dans un appel qui en résulte et qui a trait à un malade en cure obligatoire d'un établissement psychiatrique :

a) le malade est réputé capable de mandater un avocat ou un mandataire;

b) si le malade n'est pas représenté par un avocat, le conseil de révision ou le (tribunal), selon le cas, peut ordonner que les services d'un avocat lui soient fournis.

Remarque

Les articles 32 à 38 de la loi prévoient un certain nombre de dispositions relatives aux instances de devant le conseil de révision, notamment :

1. Dispositions portant constitution des conseils de révision (article 32).
2. Parties à l'instance devant le conseil de révision (article 33).
3. Avis de l'instance devant le conseil de révision (article 34).
4. Audiences du conseil de révision, y compris le droit des parties de se faire représenter par un avocat ou un mandataire, d'examiner la preuve documentaire qui sera produite et d'en faire des copies, et d'interroger le témoins. Ces dispositions prévoient également l'obligation pour le conseil de révision de s'informer pleinement de tous les faits, et elles lui confèrent le pouvoir d'assigner des témoins et d'exiger la production de documents, outre les témoins appelés et les documents produits par les parties (article 35).
5. Appel des décisions du conseil de révision (article 36).
6. Norme de preuve dans les instances aux termes de la loi (article 37).
7. Pouvoir du conseil de révision d'ordonner que les services d'un avocat soient fournis au malade en cure obligatoire (article 38).

Des dispositions devraient exister en ce qui concerne les points suivants si la loi générale d'une compétence législative ne comprend aucune disposition ailleurs à cet égard :

1. Transcription de l'instance devant le conseil de révision suffisante aux fins d'un appel devant un tribunal.
2. Pouvoir du conseil de révision de faire comparaître des témoins, de faire produire des documents, et d'exiger des

réponses données sous serment. Des dispositions devraient exister en ce qui concerne l'exécution de ces pouvoirs.

3. Obligation, pour le conseil de révision, de communiquer ses décisions motivées aux parties.

4. Pouvoir de mise à l'exécution des ordonnances du conseil de révision.

RÈGLEMENTS

39. Le lieutenant-gouverneur en conseil (ou l'autorité équivalente dans la compétence législative) peut, par règlement : *Règlements*

a) désigner des établissements psychiatriques;

b) désigner des catégories de professionnels de la santé;

c) désigner des catégories de personnes aux fins des ordonnances visées au paragraphe 4(5);

d) prescrire la façon de présenter des requêtes au conseil de révision;

e) régir les instances devant le conseil de révision;

f) prescrire le délai dans lequel les décisions du conseil de révision doivent être rendues;

g) prescrire des formules et prévoir les modalités de leur emploi.

APPENDIX L

(See page 31)

REPORT TO THE UNIFORM LAW CONFERENCE ON THE DEPARTMENT OF JUSTICE'S ACTIVITIES IN PRIVATE INTERNATIONAL LAW DURING 1987-1988

During 1987-1988 the following activities occurred.

A) *Conférence de la Haye sur le droit international privé*

Le Canada est membre depuis 1968 de la Conférence de La Haye sur le droit international privé.

ACTIVITÉS ACTUELLES DE LA CONFÉRENCE

Convention sur la signification de documents

Nous avons complété nos consultations avec les provinces et les territoires concernant la *Convention relative à la signification et à la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale* et avons entamé le processus d'adhésion à cette convention. Le décret autorisant l'adhésion vient d'être adopté et nous nous attendons à ce que l'instrument d'adhésion du Canada soit déposé auprès du ministère des Affaires étrangères des Pays-Bas en septembre. La Convention entrera en vigueur pour le Canada 6 mois après notification du dépôt de l'instrument d'adhésion aux États parties à cette convention. Le Ministre de la Justice informera ses collègues provinciaux de la date du dépôt de l'instrument d'adhésion.

Convention sur la loi applicable au trust et à sa reconnaissance

Nous signerons la *Convention sur la loi applicable au trust et à sa reconnaissance* dès que nous aurons obtenu d'un nombre suffisant de provinces et de territoires l'engagement d'adopter une loi de mise en oeuvre. En fait, l'Ile-du-Prince-Edouard et le Nouveau-Brunswick ont déjà adopté une loi de mise en oeuvre s'inspirant de la loi uniforme adoptée par cette conférence.

Convention sur la loi applicable aux successions

L'*Avant-projet de convention relative à la loi applicable aux successions à cause de mort* a été préparé par une Commission spéciale à laquelle le Canada était représenté par le professeur Talpis. Pour la première fois, la Conférence a choisi un Rapporteur spécial canadien, le professeur Donovan Waters de l'Université de Victoria. L'*Avant-projet* sera soumis pour adoption à la Seizième session de la conférence de La Haye sur le droit international privé qui se tiendra à La Haye du 3 au 20 octobre 1988.

Il s'applique uniquement aux règles déterminant la loi applicable à toutes les successions à cause de mort, qu'il y ait ou non un testament ou un pacte successoral. L'*Avant-projet* exclut de son application les questions relatives à la forme des dispositions à cause de mort, à la capacité de disposer à cause de mort et aux régimes matrimoniaux.

L'*Avant-projet de Convention* cherche à éviter la pluralité des lois applicables qui peut résulter de l'applicabilité des lois de différents pays à une même succession. Ainsi, il établit un principe unitaire en vertu duquel une seule loi régit tous les biens de la succession. Dans ce but, il détermine la loi applicable à partir d'un facteur de rattachement objectif (c'est-à-dire la résidence habituelle et la nationalité) ou selon le choix du testateur.

Divisé en cinq parties, l'*Avant-projet* détermine la loi applicable aux successions à cause de mort et aux pactes successoraux; il exclut la détermination de la loi applicable aux trusts et à certains biens et il prévoit la loi applicable selon la Convention lorsqu'un État comprend plusieurs unités territoriales.

L'*Avant-projet de convention* permet une seule réserve par laquelle un État peut exclure l'application des dispositions relatives à la loi applicable aux pactes successoraux.

Outre les clauses finales habituelles (modalités d'adhésion ou de ratification, règles d'entrée en vigueur), l'*Avant-projet* contient une clause fédérale qui permet la ratification ou l'adhésion d'un État fédéral au fur et à mesure qu'une unité territoriale met en oeuvre la Convention.

Nous avons expédié à toutes les provinces et les territoires ainsi qu'à certains experts les rapports des professeurs Talpis et Waters afin d'obtenir leurs commentaires sur l'*Avant-projet de convention*. Nous élaborerons la position canadienne à partir des deux rapports et de nos consultations. Une délégation canadienne participera à la Session d'octobre 1988.

Programme de travail de la Conférence

Du 18 au 22 janvier 1988, a eu lieu la réunion de la Commission spéciale sur les affaires générales et la politique de la Conférence de La Haye. Le but de la réunionétait de recommander un programme de travail de la Conférence pour la Seixième Session qui choisira les sujets de travail prioritaires pour les quatre prochaines années. Les sujets suivants ont été retenus comme suggestions entre lesquelles deux seront choisies à la Seizième Session pour l'élaboration d'une convention:

l'adoption internationale, la loi applicable aux accords de transferts de technologie et certains aspects de la loi applicable à la concurrence déloyable.

B) *Unidroit*

The Ottawa Conventions on International Financial Leasing and International Factoring were adopted at Ottawa on May 28, 1988, following a three week Conference convened for the purpose of examining two draft conventions developed by the Unidroit Committees of Governmental Experts. Canada was represented on the Committees by Professor Ronald Cuming of the University of Saskatchewan, and at the conference by the following persons:

Anne-Marie Trahan	—	Head of Delegation
Christiane Verdon	—	Justice
Jacques Gauthier	—	Justice
Valerie Hughes	—	Justice
François Mathys	—	External Affairs
Brian Dickson	—	External Affairs
David Allin	—	External Affairs
Ronald Cuming	—	University of Saskatchewan
Jacob Ziegel	—	University of Toronto
Claude Samson	—	Université Laval
Kevin Smyth	—	Lavery, O'Brien (Montreal)
Robert Turnbull	—	Canadian Bankers' Association

The Conference was attended by representatives of 59 States and 10 international organizations.

Essentially, the leasing convention governs a tri-partite arrangement between persons in different States whereby the lessee (someone who requires equipment) arranges with the lessor (a financier) to purchase equipment from a named supplier and to make it available through a contractual arrangement, which is essentially a financing device. The lessor is technically the purchaser of the goods, but the lessee is the one who will use them. The financial lease is designed to ensure that the lessor recovers its capital outlay and a return on its investment.

The factoring convention concerns an arrangement whereby a finance company (the factor) purchases the trade debts of a manufacturer (the supplier) and in most cases undertakes to recover the debts from the latter's customer. Generally, international factoring entails an arrangement between an exporter and a factor under which accounts owing by customers in another country are factored.

The purpose of both Conventions is to provide uniformity among nations with respect to the laws governing international financial leasing and international factoring. The Conventions provide uniform rules to be adopted by those countries wishing to implement them, but individual parties to contracts may exclude the application of the Conventions to their particular transactions. (See Article 5 of the Leasing Convention and Article 3 of the Factoring Convention.)

The following countries signed the Conventions: Ghana, Guinea, the Philippines, Tanzania, Nigeria and Morocco.

The provinces and territories as well as the academic and business communities were consulted on the contents of the draft conventions prior to the Conference. Currently, interest in Canada in these conventions is limited. Most of our international financial leasing occurs with the United States and no significant problems have arisen for which uniform rules are necessary. It is nevertheless expected that interest in these fields will develop.

The Minister of Justice will seek the views of the provinces and territories, as well as the academic and business communities, as to whether Canada should accede to the Conventions.

C) *UNCITRAL*

The United Nations Commission on International Trade Law was created in 1966 by United Nations General Assembly Resolution 2205 (XXI) in order to enable the United Nations to play a more active role in reducing or removing legal obstacles to the flow of international trade. The mandate given by the General Assembly to UNCITRAL as the "core legal body within the United Nations system in the field of international trade law" is to further the progressive harmonization and unification of the law of international trade.

The membership of UNCITRAL is limited at present to thirty-six States, structured so as to be representative of the various geographic regions and the principal economic and legal systems of the world. Observers from States and international governmental and non-governmental organizations are welcome to participate at meetings of UNCITRAL and of its working groups. Although Canada has never been a member of the Commission, it has participated very actively and strongly as an observer at meetings of the Commission and of its working groups. Nevertheless, membership in the Commission does not bring the advantage of greater visibility among the nations and Canada will therefore be a candidate at the election to be held by the General

Assembly in the autumn of 1988 for a six year term on the Commission, beginning in 1989.

The Commission now has three working groups: the Working Group on the New International Economic Order, the Working Group on International Payments and the Working Group on International Contract Practices.

UNCITRAL WORK OF CURRENT INTEREST

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

This Convention applies to contracts of sale of goods between parties whose places of business are in different States when the States are contracting States or when the rules of private international law lead to the application of the law of a contracting State. It does not generally apply to sales of goods bought for personal, family or household use, to sales of goods by auctions, to sales of stocks, shares, investments securities, negotiable instruments or money or to sales of ships, vessels, hovercrafts, aircraft or electricity. The Convention governs the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In general, it is not concerned with the validity of the contract or any of its provisions or the effect which the contract may have on the property in the good sold. Also, it does not apply to liability of the seller of the goods for death or personal injury caused by the goods to any person. The Vienna Sales Convention came into force on January 1, 1988 among eleven States: namely, Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, the United States, Yugoslavia and Zambia. It will come into force for Finland, Sweden, Austria and Mexico at the end of 1988 or early in 1989. Active consideration is now being given by the Federal Government and the provinces to the enactment of legislation which would permit Canada to accede to the Convention. Prince Edward Island, Nova Scotia and Ontario have enacted implementing legislation.

Draft Convention on International Bills of Exchange and International Promissory Notes

The UNCITRAL draft Convention on International Bills of Exchange and Interantional Promissory Notes was adopted by the Commission at its twentieth session in August, 1988. It was sent to the Sixth Committee of the U.N. General Assembly (Legal Committee) for consideration with a view to its being adopted by the General Assembly and opened for signature by States. The Sixth Committee decided, however,

that U.N. member States should be asked for their comments on the Draft Convention and these comments will be considered by a Working Group of the Sixth Committee which will meet in New York from September 26 to October 7, 1988. The intention is that the Working Group will review the Convention in the light of comments received from States, make any changes that may be agreed upon and return the Convention to the Sixth Committee for approval and adoption by the General Assembly. The Department of Justice has been in consultation for several years with the Canadian Bankers Association and the Canadian Payments Association and has strongly supported the Convention which will provide a new international regime based on a viable compromise between the common law and the civil law systems. Canada participated actively in its preparation and will do so at the Sixth Committee.

Model Rules on Electronic Funds Transfers

The UNCITRAL Working Group on International Payments is engaged in the preparation of model rules on electronic funds transfers based on the legal guide on EFT that was prepared by UNCITRAL. The model rules could provide a basis for domestic regulation and Canada is participating actively in their preparation. To that end, the Department of Justice is consulting very widely within the federal government, the provincial governments, with private industry and with academics. The Working Group has already had two meetings and will meet again from December 5 to 16, 1988 in Vienna and July 10 to 21, 1989 in New York. It will likely take at least a further year beyond then to complete the work.

Stand-by Letters of Credit and Guarantees

The Working group on International Contract Practices will meet in Vienna from November 21 to December 2, 1988 to review the draft Uniform Rules for Guarantees produced by a working party of the International Chamber of Commerce on January 8, 1988. The Working Group will consider their acceptability on a world-wide basis. It will also consider and recommend to the Commission whether it would be advisable to undertake the drafting of a model uniform law on stand-by letters of credit which could be adopted by States. The Department of Justice has already begun the consultation process with interested organizations and persons. Stand by letters of credit and guarantees play a similar and important role in commercial practice and raise essentially the same kinds of issues, but have traditionally received different legal treatment. The law is mostly found in the jurisprudence at present.

Model Law on International Commercial Arbitration

All Canadian jurisdictions have enacted legislation based on the UNCITRAL model law on international commercial arbitration, which was adopted by the Commission in 1985. Canada is the first State to have adopted the model law although some others have now done so.

United Nations Convention on the Carriage of Goods by Sea, 1978

This Convention, known as the Hamburg Rules, raises the limits of liability of carriers from those set out in the Hague-Visby Rules (Hague Convention of 1924; Visby Protocol of 1968). It also increases the legal responsibility of the carrier by providing generally that the carrier is responsible for damage or loss unless he proves that he was not negligent. At present, the onus is generally reversed. In 1984, Transport Canada published a discussion paper recommending Canadian accession to this Convention, but it was not favourably received by Canadian industry. Canada is not a party to the Hague-Visby Rules, although the Hague Convention forms the basis of the *Carriage of Goods by Water Act*.

Draft Convention on Liability of Operators of Transport Terminals in International Trade

At its most recent session the Commission adopted the report of the Working Group on International Contract Practices that contained a draft Convention on liability of operators of transport terminals in international trade. The Commission authorized the circulation of the draft Convention to States for comments. It is expected that the draft Convention will be the key item at the next session of the Commission in the Spring of 1989 where a decision should be taken to refer it to the General Assembly of the United Nations for further action.

The purpose of the Convention is to establish uniform limits of liablility for the operators of transport terminals engaged in international trade. The Convention does not apply to the carriage of goods, but rather to their transfer by, for example, stevedores or air or land terminal operators. The liability regime is similar to that established under the Montreal Protocols of the Warsaw Convention. In addition to establishing the limits of liability, the draft Convention provides the operators with a security interest in the goods for non-payment of charges.

The Department of Justice will be consulting industry representatives and the provinces on the draft Convention, with the cooperation of the Department of Transport, over the next several months. The Gov-

ernment of Canada must provide UNCITRAL with comments on the draft Convention by the end of November 1988.

International Procurement

Work on international procurement will be commenced by the Working Group on the New International Economic Order which will meet in Vienna from October 17 to 28, 1988 and again in New York from April 17 to April 28, 1989. The UNCITRAL Secretariat proposes that the Working Group should agree upon and adopt a set of principles for effective national procurement laws, and based on those principles, a model procurement code which could be adopted by States. The project will probably take about four years to complete. This subject is considered important by developing States who often perceive their access to markets in developed States as being unnecessarily limited by governmental procurement practices, in particular. The Department of Justice will participate very actively in the work on international procurement. The Department will consult with federal and provincial government departments and with industry as the work progresses. Some consultation has already taken place.

APPENDIX L

(See page 31)

REPORT OF THE SPECIAL COMMITTEE ON PRIVATE INTERNATIONAL LAW

The Special Committee on Private International Law was formed by the Uniform Law Conference in 1973 to provide effective cooperation between the federal and provincial governments and to smooth the way of Canadian ratification and accession to international treaties and conventions. The purpose of the Conference can best be achieved by a close liaison between the Committee and the Advisory Group on Private International Law and Unification of Law established by the federal Department of Justice. A member of your Conference's Special Committee, Christiane Verdon, Q.C., is Chairman of the Advisory Group of the federal Department of Justice. Two other members of the Special Committee, namely John Gregory and Peter Pagano are also members of the Advisory Group. Mr. Graham D. Walker, Q.C., the Special Committee Chairman, is a former member of the group. The members of the Special Committee are Emile Colas, Q.C., LL.D., John Gregory, Peter Pagano, Christiane Verdon, Q.C., and Graham D. Walker, Q.C.

Progress by the provincial governments in enacting legislation in the Private International Law field in the last three years is as follows:

Newfoundland and Labrador

The Province of Newfoundland and Labrador, in 1986, enacted the International Commercial Arbitration Act which came into force on February 1, 1988.

Nova Scotia

The Province of Nova Scotia has enacted the International Commercial Arbitration Act, the Aircraft Security Interest Act and the International Sale of Goods Act. Like Ontario and Prince Edward Island, the Nova Scotia Uniform International Sale of Goods Act contains a provision removing limits to all reservations provided to the Convention and adding a Section to help avoid the risk of ambiguous references to private law in contracts governed by the Convention.

Prince Edward Island

Prince Edward Island has enacted the International Commercial Arbitration Act, the International Trusts Act and the International Sale of Goods Act. The Prince Edward Island International Sale of Goods Act contains the two special provisions refered to in the Nova Scotia and Ontario paragraphs.

New Brunswick

New Brunswick has enacted the International Commercial Arbitration Act, the International Trust Act and the Conflict of Laws Rules for Trusts Act.

Ontario

Ontario gave Royal Assent to the International Commercial Arbitration Act, 1988. This Act, substantially in the form of the Uniform International Commercial Arbitration Act (S.O. 1988 c. 30), gives effect to the UNCITRAL Model Law on International Arbitration. The Act repeals the Foreign Arbitral Awards Act, 1986 (S.O. 1986, c. 25), to avoid duplication. The new statute serves to implement the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. A section was added to the Uniform Act to ensure this result.

On June 30, 1988, Ontario gave Royal Assent to the International Sale of Goods Act, 1988 (S.O. 1988, C. 45). This Bill, substantially in the form of the Uniform International Sale of Goods Act, implements the United Nations Convention on the International Sale of Goods, popularly known as the Vienna Sales Convention. It is now in force, but will have practical effect only when the Convention comes into force for Canada. This will happen one year after the federal government submits the appropriate documents to the United Nations. Ontario's Bill makes two changes to the Uniform Act. First, it removes limits to all reservations permitted to the Convention, a change recommended by the Minister of Justice's Advisory Group on Private International Law. Second, it adds a Section to help avoid the risk of ambiguous references to provincial law in contracts governed by the Convention.

Quebec

Only one Act respecting Private International Law has been enacted in 1987. It is an act on international adoption, 1987, L.Q. ch. 44. The Act dealing with International arbitration was enacted prior to 1987 in chapter 73 of 1986.

Two draft bills that have been introduced by the Minister of Justice before the National Assembly that may be of interest are an Act to add the reformed law of obligations to the Civil Code of Quebec, introduced in December 1987, which deals with International Sale of Goods in the chapter on Sale and an Act to add the reformed law of evidence, and prescription and private international law to the Civil Code of Quebec was introduced on June 16, 1988.

This draft bill is adding Book Ten to the Civil Code and contains more than ninety articles on conflicts of law, (trusts being included), jurisdiction of our courts in those matters and recognition of foreign judgments.

Alberta

Alberta has enacted the International Commercial Arbitration Act.

British Columbia

British Columbia has enacted the International Commercial Arbitration Act, which is complete in itself, rather than using the Uniform International Arbitration Act model.

Yukon

The Yukon has enacted the Uniform Foreign Arbitral Awards Act as well as the International Commercial Arbitration Act.

Northwest Territories

The Northwest Territories has enacted the International Commercial Arbitration Act and in 1987, the International Child Abduction Act.

During the coming year, the Committee will try to maintain a close relationship with the Advisory Group on Private International Law and the Unification Law and report to this Conference at its 1989 meeting.

All of which is respectfully submitted on behalf of the Committee,

August 10, 1988 Graham D. Walker, Q.C.

APPENDIX M

(See page 44)

TERMS OF REFERENCE OF RESEARCH FUND

The Research Fund was established by a grant from the Government of Canada in the amount of $25,000.00 with an annual commitment of $25,000.00, to a maximum of $75,000.00, with a further commitment of an amount not exceeding $25,000.00 annually to maintain the fund annual at $75,000.00. The fund and the annual grant are an outright grant to the Conference with the accumulated interest being the property of the Conference and applied to the General Account.

The purpose of the fund is to provide for research projects, as approved by the executive, with no other approvals required.

The following are the only guidelines applicable to the payment of monies from the fund:

1. all research projects must be approved by the executive either on the recommendation of a chairman of one of the sections of the Conference or on the initiative of the executive;

2. a project may be approved by the executive involving research in any area of law including research with respect to an existing or proposed Uniform Act;

3. that contracts for research work should be between the Conference and a researcher, to be prepared by the Executive Secretary and approved by the President, in close consultation with the jurisdiction or committee involved, and signed on behalf of the Conference by either the president or a vice-president and by either the secretary or the treasurer;

4. the executive may approve the payment of administrative expenses directly associated with a research project including travel, accommodation and meals all at the most economical rates, according to the per diem of the Government of Canada, supplies, secretarial expenses, and other expenses in relation to the project in order to ensure completion of the project, unless the executive has approved expenses at another rate;

5. the responsibility for supervising the research work, under the direction of the executive, is placed with the jurisdiction or committee that has the project in hand;

6. the Executive Secretary and the Treasurer of the Conference shall pay money out of the research fund upon being satisfied that the requests for money have been properly incurred in respect of an approved project and are at a rate authorized by these terms of reference;

7. it is an appropriate use of the research fund to pay for the printing of any product generated by a section including the appendices to the Proceedings of the Conference and the production of pamphlet copies of Uniform or Model Acts;

8. the executive may require the chairman of the sections to submit a budget for research each year.

These terms of reference represent all terms of reference of the research fund and all previous terms of reference are repealed.

APPENDIX N

(See page 31)

REPORT OF THE STEERING COMMITTEE, 1988

The Steering Committee is composed of Basil D. Stapleton, Q.C., as Chairman, with James Breithaupt of Ontario and Marie-José Longtin of Québec as members. Graham D. Walker, Q.C. of Nova Scotia and Georgina Jackson of Saskatchewan serve as advisors. M. M. Hoyt, Q.C., Executive Director of the Conference serves as Secretary to the Committee.

The Committee functions principally in relation to the agenda of the Uniform Law Section. The tentative agenda approved by the Section in August was distributed to all jurisdictions in the Fall. Subsequently, the Chairman made contact in writing and by telephone on several occasions with each reporter to determine the progress of their work and to schedule the receipt of reports.

The Committee met in February in Saint John and in June in Toronto to receive status reports, to discuss some policy matters and to set the final agenda. In order to accommodate some resource persons who were being invited to attend the Section meeting in relation only to specific agenda items, it was decided to schedule each agenda item for a specified morning or afternoon session on a designated day. This experience will be monitored to determine whether or to what extent it is successful.

With the cooperation of the reporters, reports on all of the major agenda items were received at least a month in advance of the 1988 Conference and were distributed to the jurisdictions. The Committee expresses its gratitude to the reporters and wishes to encourage such continued cooperation to the considerable advantage of all concerned.

The Committee will be meeting during the week of the 1988 Conference. Particular attention will be given to the means by which new items are elicited for addition to the agenda.

APPENDIX 0

(See page 31)

UNIFORM TRADE SECRETS ACT

Interpretation 1(1) In this Act,

"Court" means [insert name of appropriate court];

"improper means" includes commercial espionage by electronic or other means;

"trade secret" means any information that

(a) is, or may be, used in a trade or business,

(b) is not generally known in that trade or business,

(c) has economic value because it is not generally known, and

(d) is the subject of efforts that are reasonable under the circumstances to prevent it from becoming generally know.

(2) For the purposes of the definition trade secret "information" includes information set out, contained or embodied in, but not limited to, a formula, pattern, plan, compilation, computer program, method, technique, process, product, device or mechanism.

Crown is bound 2 This Act binds the Crown.

Equity and common law preserved 3 This Act does not affect any rule of equity or of the common law by virtue of which obligations of confidence arise with respect to the acquisition, disclosure or use of confidential information.

Non-application of Uniform Contributory Fault Act 4 The *Uniform Contributory Fault Act* does not apply to proceedings under this Act.

Knowledge acquired in course of work 5 Nothing in this Act is intended to impose on anyone any liability for the acquisition, disclosure or use of information acquired in the course of a person's work if the information is of such a nature that its acquisition amounts to no more than an enhancement of that person's personal knowledge, skill or expertise.

Improper acquisition 6(1) A person entitled to the benefit of a trade secret has a right of action against any person who acquires the trade secret by improper means.

(2) A trade secret is not acquired by improper means if it is developed independently or arrived at by reverse engineering.

Unlawful disclosure or use

7 A person entitled to the benefit of a trade secret has a right of action against any person who discloses or uses the trade secret if the discloser or user knew or ought to have known that there was no lawful authority to disclose or use the trade secret in the manner that it was disclosed or used.

Court orders

8(1) Where the Court in an action under section 6 or 7 determines that a person acquired a trade secret by improper means or has disclosed or used a trade secret without lawful authority, the Court may do any one or more of the following:

(a) grant an interlocutory or permanent injunction;

(b) award compensatory damages;

(c) order the defendant to account to the plaintiff for any profits that have accrued, or that subsequently may accrue, to the defendant by reason or in consequence of the improper acquisition or unlawful disclosure or use of the trade secret;

(d) award exemplary damages;

(e) subject to subsection (3), make an adjustment order regulating the future use of the trade secret by the defendant or by both the plaintiff and the defendant;

(f) make any other order the Court considers appropriate.

(2) The Court shall not exercise its discretion to award both compensatory damages and an account of profits in a manner that allows a plaintiff to recover twice for the same loss.

(3) An order referred to in subsection (1)(e) may include any one or more of the following:

(a) payment in a lump sum or periodic payments, to the plaintiff with respect to the future use by the defendant of the trade secret in an amount and on terms that the Court considers appropriate;

(b) contribution by the defendant to the plaintiff for expenses incurred by the plaintiff in connection with the acquisition or development of the trade secret;

(c) a determination of any incidental question relating to the extent to which both the plaintiff and the defendant may use the trade secret in the future, and the rights and liabilities of each with respect to that use.

(4) On application, the Court shall terminate an injunction if the trade secret ceases to be a trade secret but the injunction may be continued for any additional period of time and on terms that the Court considers reasonable in order to eliminate any commercial advantage that would otherwise accrue to the defendant from the improper acquisition or unlawful disclosure or use.

Good faith acquisition, use or disclosure

9(1) A person who in good faith acquires, discloses or uses a trade secret and subsequently learns that a person entitled to the benefit of the trade secret has been unlawfully deprived of the benefit, or the person entitled to that benefit, may apply to the Court for a declaration of the rights of the parties.

(2) In a proceeding under subsection (1), the Court may do either or both of the following:

(a) make an interim order to protect the interests and preserve the rights of the parties as it considers appropriate;

(b) make an order under section 8 as if the proceeding were an action referred to in section 6 or 7.

(3) In a proceeding under subsection (1), the Court shall, in determining the rights of the parties, have regard to

(a) the value of the consideration given by the person for the trade secret,

(b) any change in the position of the person in reliance on or in order to use the trade secret made before discovering that the person entitled to the benefit of the trade secret had been unlawfully deprived of the benefit,

(c) the protection granted by this Act to the person entitled to the benefit of a trade secret, and

(d) any other matter the Court considers relevant.

Defences

10(1) In any proceedings under this Act for the unlawful disclosure or use of a trade secret, the defendant is not liable to the plaintiff if the defendant satisfies the Court

(a) that the disclosure was required to be made to a court or tribunal pursuant to any power in that court or tribunal to order the disclosure of information, or

(b) that, in view of the nature of the trade secret, there was, or will be, at the time of the disclosure or use a public interest involved in the disclosure or use that outweighs the upholding of the trade secret.

(2) For the purposes of subsection (1)(b), a public interest in the disclosure or use of a trade secret means the interest of the public at large in being made aware of the existence of

(a) an offence committed under a law in force in [enacting jurisdiction] or other unlawful conduct, or

(b) a matter affecting the public health or safety,

in relation to the development, composition or use of the trade secret.

(3) For the purposes of subsection (1)(b), the Court shall have regard to all the circumstances of the case, including

(a) the nature of the trade secret,

(b) the circumstances under which the trade secret was or will be disclosed or used by the defendant, and

(c) whether the extent and nature of the disclosure or use was or will be justified.

Preservation of trade secret

11(1) In any proceedings under this Act, the Court may, at any time, on application, make an order directing by what means the trade secret at issue in the proceedings is to be preserved during the course of the proceedings.

(2) Without limiting the generality of subsection (1), the Court may

(a) hold hearings in private,

(b) order that all or any of the records of the proceedings be sealed, or

(c) order any person involved in the proceedings not to disclose an alleged trade secret without prior approval of the Court.

Assignment of trade secrets

12 A person entitled to the benefit of a trade secret may assign a right to the trade secret, either in whole or in part, and either generally or subject to territorial limitations, and may grant an interest in the right to the trade secret by licence or otherwise.

Limitation period

13(1) Proceedings for the improper acquisition or unlawful disclosure or use of a trade secret must be commenced within 2 years after the acquisition, disclosure or use, as the case may be, is discovered or, by the exercise of reasonable diligence, ought to have been discovered.

(2) For the purposes of this section, a continuing disclosure or use constitutes a single claim.

[If a discovery rule is not desired in the particular jurisdiction, add the usual tort period for that jurisdiction, calculated from the point at which the cause of action arose.]

[Jurisdictions may wish to place section 13 in their legislation that deals with limitation of actions.]

APPENDICE 0

(voir page 31)

LOI UNIFORME SUR LES SECRETS COMMERCIAUX

Définitions

1. 1) Dans la présente loi:

"tribunal" signifie (inscrire le nom du tribunal approprié);

"moyens répréhensibles" comprend l'espionnage commercial par des moyens électroniques ou autres;

"secret commercial" signifie toute information qui possède les caractéristiques suivantes:

a) elle est ou peut être utilisée dans un commerce ou une entreprise;

b) elle n'est pas généralement connue dans ce commerce ou cette entreprise;

c) elle a une valeur économique du fait qu'elle n'est pas généralement connue;

d) elle fait l'objet de mesures qui, dans les circonstances, sont raisonnables pour éviter qu'elle ne soit généralement connue.

2) Aux fins de la définition de l'expression "secret commercial", le mot "information" comprend l'information exposée ou contenue, notamment, dans une formule, un modèle, un plan, une compilation, un logiciel, une méthode, une technique, un procédé, un produit, un dispositif ou un mécanisme, ou qui y est incorporée.

Application à la Couronne

2. La présente loi s'applique à la Couronne.

Maintien des règles de l'"Equity" et de la "Common Law"

3. La présente loi ne porte pas atteinte aux règles de l'"Equity" ou de la "Common Law" dont découle l'obligation au secret à l'égard de l'acquisition, de la divulgation ou de l'utilisation d'informations confidentielles.

Non-application de la Loi uniforme sur la faute contributive

4. La Loi uniforme sur la faute contributive ne s'applique pas aux procédures introduites en vertu de la présente loi.

Connaissance acquise dans l'exercice d'une fonction

5. Rien dans la présente loi n'entraîne de responsabilité pour quiconque acquiert, divulgue ou utilise des informations acquises dans l'exercice de ses fonctions si ces informations sont d'une nature telle que leur acquisition ne représente rien de plus que l'enrichissement de ses connaissances personnelles, de ses compétences ou de son savoir-faire.

Acquisition par des moyens répréhensibles

6. 1) La personne qui a droit aux bénéfices d'un secret commercial peut intenter une action à quiconque acquiert ce secret par des moyens répréhensibles.

2) Un secret commercial n'est pas acquis par des moyens répréhensibles s'il a été mis au point de façon indépendante ou qu'on y est arrivé par rétrotechnique.

Divulgation ou utilisation illicites

7. La personne qui a droit aux bénéfices d'un secret commercial peut intenter une action à quiconque divulgue ou utilise ce secret si ce dernier savait ou aurait dû savoir qu'il n'avait pas l'autorisation légale de divulguer ou d'utiliser ce secret comme il l'a fait.

Ordonnances du tribunal

8. 1) Dans une action intentée en vertu des articles 6 ou 7, lorsque le tribunal détermine qu'une personne a acquis un secret commercial par des moyens répréhensibles ou a divulgué ou utilisé un secret commercial sans autorisation légale, il peut rendre l'une ou plusieurs des décisions suivantes:

a) accorder une injonction interlocutoire ou permanente;

b) accorder des dommages-intérêts compensatoires;

c) ordonner au défendeur de restituer au demandeur tous les bénéfices qu'il a réalisés, ou qu'il pourra réaliser par la suite, en raison ou comme conséquence de l'acquisition par des moyens répréhensibles ou de la divulgation ou de l'utilisation illicites du secret commercial;

d) accorder des dommages-intérêts exemplaires;

e) sous réserve du paragraphe 3, rendre une ordonnance de répartition régissant l'utilisation future du secret commercial par le défendeur ou par le demandeur et le défendeur;

f) rendre toute autre ordonnance qu'il juge appropriée.

2) Le tribunal ne doit pas exercer son pouvoir discrétionnaire d'accorder des dommages-intérêts compensatoires et d'ordonner une restitution des bénéfices d'une façon qui permette au demandeur d'être indemnisé deux fois pour la même perte.

3) Une ordonnance de réparation à laquelle réfère le sous-paragraphe e) du paragraphe 1 peut comprendre une ou plusieurs des mesures suivantes:

a) un paiement au demandeur, en un ou plusieurs versements, pour l'utilisation future du secret commercial par le défendeur, au montant et selon les conditions que le tribunal juge appropriés;

b) la contribution du défendeur au demandeur pour les frais engagés par le demandeur et relatifs à l'acquisition ou à la mise au point du secret commercial;

c) la détermination de toute question accessoire relative à la mesure dans laquelle tant le demandeur que le défendeur pourront utiliser le secret commercial à l'avenir, ainsi qu'aux droits et obligations de chacun quant à cette utilisation.

4) Sur demande, le tribunal met fin à une injonction lorsque le secret commercial cesse d'en être un. Toutefois, l'injonction peut être maintenue pendant une période additionnelle et aux conditions que le tribunal juge raisonnable pour éliminer tout avantage commercial que pourrait autrement réaliser le défendeur du fait de l'acquisition par des moyens répréhensibles ou de la divulgation ou de l'utilisation illicites du secret commercial.

Acquisition, divulgation ou utilisation de bonne foi

9. 1) Lorsqu'un personne, de bonne foi, acquiert, divulgue ou utilise un secret commercial et apprend, par la suite, qu'une personne qui a droit aux bénéfices de ce

secret commercial en a été privée illégalement, la personne qui a droit à ces bénéfices ou celle qui a ainsi acquis, divulgué ou utilisé de bonne foi ce secret commercial peut demander au tribunal de statuer sur les droits des parties.

2) Dans une procédure prévue au paragraphe 1, le tribunal peut rendre l'une ou l'autre des ordonnances suivantes ou les deux:

a) une ordonnance provisoire visant à protéger les intérêts des parties et à préserver leurs droits, comme il le juge à propos;

b) une ordonnance en vertu de l'article 8 comme s'il s'agissait d'une action mentionnée aux articles 6 ou 7.

3) Dans un procédure prévue au paragraphe 1, le tribunal détermine les droits des parties en tenant compte de:

a) la valeur de la contrepartie donnée par la personne pour le secret commercial;

b) tout changement à la situation de la personne en raison du secret commercial ou en vue de l'utiliser, fait avant qu'elle ne découvre que la personne qui avait droit aux bénéfices du secret commercial en a été privée illégalement;

c) la protection accordée par la présente loi à la personne qui a droit aux bénéfices du secret commercial;

d) tout autre sujet que le trinbual juge approprié.

Moyens de défense

10. 1) Dans toute procédure prévue par la présente loi et relative à la divulgation ou à l'utilisation illicites d'un secret commercial, le défendeur ne sera aucunement tenu responsable envers le demandeur s'il démontre, à la satisfaction du tribunal, l'un ou l'autre des éléments suivants:

a) que la divulgation a dû être faite à une cour ou à un autre tribunal en vertu d'un pouvoir de cette cour ou de ce tribunal d'ordonner la divulgation de l'information;

b) qu'étant donné la nature du secret commercial, l'intérêt public à ce qu'il soit divulgué ou utilisé

l'emportait ou l'emportera, au moment de la divulgation ou de l'utilisation, sur le maintien du secret commercial.

2) Aux fins du sous-paragraphe b) du paragraphe 1, il y a intérêt public à ce que soit divulgué ou utilisé un secret commercial s'il est de l'intérêt du public en général qu'il soit informé de l'existence, eu égard à la mise au point, à la nature ou à l'utilisation du secret commercial:

a) d'une infraction à une loi en vigueur (sur le territoire de l'autorité qui a fait adopter le présente loi) ou d'un autre comportement illégal;

b) d'une question mettant en jeu la santé ou la sécurité publique.

3) Aux fins du sous-paragraphe b) du paragraphe 1, le tribunal doit tenir compte de toutes les circonstances de la cause, y compris:

a) la nature du secret commercial;

b) les circonstances dans lesquelles le secret commercial a été ou sera divulgué ou utilisé par le défendeur;

c) si la portée et la nature de la divulgation ou de l'utilisation du secret commercial étaient ou seront justifiées.

Garde du secret commercial

11. 1) Dans un procédure prévue à la présente loi, le tribunal peut en tout temps, sur demande, rendre une ordonnance indiquant les moyens par lesquels on assurera la garde du secret commercial dont il est question pendant la durée de la procédure.

2) Sans limiter la portée générale du paragraphe 1, le tribunal peut:

a) tenir des audiences à huis clos;

b) ordonner que tous ou certains des documents relatifs à la procédure soient placés sous scellés;

c) ordonner à toute personne engagée dans la procédure de ne pas divulguer le secret commercial allégué sans l'approbation préalable du tribunal.

Cession des secrets commerciaux

12. Toute personne qui a droit aux bénéfices d'un secret commercial peut céder ses droits sur ce secret commercial, soit en tout ou en partie, et soit de façon générale ou sous réserve de restrictions territoriales et peut accorder un droit sur le secret commercial par licence ou autrement.

Prescriptions

13. 1) Les procédures relatives à l'acquisition par des moyens répréhensibles ou à la divulgation ou à l'utilisation illicites d'un secret commercial doivent être instituées dans les deux ans du moment où l'acquisition, la divulgation ou l'utilisation, selon le cas, est découverte ou, si l'on avait fait preuve d'une diligence raisonnable, du moment où elle aurait dû l'être.

2) Aux fins du présent article, la divulgation ou l'utilisation continues constituent une seule réclamation.

[Si une autorité ne désire pas retenir le délai proposé de deux ans, elle peut utiliser le délai de prescription usuel en matière de délits dans cette juridiction, calculé à partir du moment où la cause d'action a pris naissance.]

[Une autorité peut, si elle le désire, insérer l'article 13 dans sa loi concernant la prescription des actions en justice.]

TABLE I

UNIFORM ACTS PREPARED, ADOPTED AND PRESENTLY RECOMMENDED BY THE CONFERENCE FOR ENACTMENT

Title	Year First Adopted and Recommended	Subsequent Amendments and Revisions
Accumulations Act	1968	
Bills of Sale Act	1928	Am '31, '32; Rev. '55; Am '59, '64, '72.
Bulk Sales Act	1920	Am. '21, '25, '38, '49; Rev. '50, '61
Change of Name Act	1987	
Child Status Act	1980	Rev. '82
Condominium Insurance Act	1971	Am '73.
Conflict of Laws Rules for Trusts Act	1987	Am. '88
Conflict of Laws (Traffic Accidents) Act	1970	
Contributory Fault Act	1984	
Contributory Negligence Act	1924	Rev '35, '53; Am '69
Criminal Injuries Compensation Act	1970	Rev. '83.
Custody Jurisdiction and Enforcement Act	1974	Rev '81
Defamation Act	1944	Rev. '48; Am. '49, '79.
Dependants' Relief Act	1974	
Devolution of Real Property Act	1927	Am. '62.
Domicile Act	1961	
Effect of Adoption Act	1969	
Evidence Act	1941	Am. '42, '44, '45; Rev '45; Am. '51, '53, '57; Rev '81
— Affidavits before Officers	1953	
— Foreign Affidavits	1938	Am. '51; Rev '53
— Hollington v. Hewthorne	1976	
—Judicial Notice of Acts, Proof of State Documents	1930	Rev. '31
— Photographic Records	1944	
— Russell v. Russell	1945	
— Use of Self-Criminating Evidence Before Military Boards of Inquiry	1976	
Family Support Act	1980	Am '86
Fatal Accidents Act	1964	
Foreign Arbitral Awards Act	1985	
Foreign Judgments Act	1933	Rev '64
Franchises Act	1984	Rev. '85.
Frustrated Contracts Act	1948	Rev '74
Highway Traffic — Responsibility of Owner & Driver for Accidents	1962	
Hotelkeepers Act	1962	
Human Tissue Gift Act	1970	Rev. '71.
Information Reporting Act	1977	
Inter-Jurisdictional Child Welfare Orders Act	1988	
International Child Abduction Act	1981	
International Commercial Arbitration Act	1986	
International Sale of Goods Act	1985	
International Trusts Act	1987	Am. '88
Interpretation Act	1938	Am. '39; Rev '41; Am '48; Rev '53, '73; Rev. '84.

Title	Year First Adopted and Recommended	Subsequent Amendments and Revisions
Interprovincial Subpoenas Act	1974	
Intestate Succession Act	1925	Am. '26, '50, '55; Rev. '58; Am. '63; Rev. '85.
Judgment Interest Act	1982	
Jurors' Qualifications Act	1976	
Legitimacy Act	1920	Rev '59
Limitation of Actions Act	1931	Am. '33, '43, '44.
Limitations Act	1982	
— Convention on the Limitation Period in the International Sale of Goods	1976	
Maintenance and Custody Enforcement Act	1985	
Married Women's Property Act	1943	
Medical Consent of Minors Act	1975	
Mental Health Act	1987	
Occupiers' Liability Act	1973	Am. '75.
Partnerships Registration Act	1938	Am '46
Perpetuities Act	1972	
Personal Property Security Act	1971	Rev '82.
Powers of Attorney Act	1978	
Presumption of Death Act	1960	Rev. '76
Proceedings Against the Crown Act	1950	
Products Liability Act	1984	
Reciprocal Enforcement of Judgments Act	1924	Am '25; Rev. '56; Am. '57; Rev. '58; Am. '62, '67.
Reciprocal Enforcement of Maintenance Orders Act	1946	Rev. '56, '58; Am. '63, '67, '71; Rev. '73, '79; Am. '82; Rev '85
Reciprocal Recognition and Enforcement of Judgments Act	1981	
Regulations Act	1943	Rev '82
Retirement Plan Beneficiaries Act	1975	
Sale of Goods Act	1981	Rev '82
Service of Process by Mail Act	1945	
Statutes Act	1975	
Survival of Actions Act	1963	
Survivorship Act	1939	Am. '49, '56, '57; Rev. '60, '71.
Testamentary Additions to Trusts Act	1968	
Trade Secrets Act	1987	
Transboundary Pollution Reciprocal Access Act	1982	
Trustee (Investments)	1957	Am. '70
Trusts, Conflict of Laws	1987	Am. '88
Variation of Trusts Act	1961	
Vital Statistics Act	1949	Am '50, '60, Rev. '86.
Warehousemen's Lien Act	1921	
Warehouse Receipts Act	1945	
Wills Act		
— General	1953	Am '66, '74, '82, '86.
— Conflict of Laws	1966	
— International Wills	1974	
— Section 17 revised	1978	
— Substantial Compliance	1987	

TABLE II

UNIFORM ACTS PREPARED, ADOPTED AND RECOMMENDED FOR ENACTMENT WHICH HAVE BEEN SUPERSEDED BY OTHER ACTS, WITHDRAWN AS OBSOLETE, OR TAKEN OVER BY OTHER ORGANIZATIONS

Title	Year Adopted	No. of Jurisdictions Enacting	Year Withdrawn	Superseding Act
Assignment of Book Debts Act	1928	10	1980	Personal Property Security Act
Conditional Sales Act	1922	7	1980	Personal Property Security Act
Cornea Transplant Act	1959	11	1965	Human Tissue Act
Corporation Securities Registration Act	1931	6	1980	Personal Property Security Act
Fire Insurance Policy Act	1924	9	1933	*
Highway Traffic — Rules of the Road	1955	3		**
Human Tissue Act	1965	6	1970	Human Tissue Gift Act
Landlord and Tenant Act	1937	4	1954	None
Life Insurance Act	1923	9	1933	*
Pension Trusts and Plans — Appointment of Beneficiaries	1957	8	1975	Retirement Plan Beneficiaries Act
— Perpetuities	1954	8	1975	In part by Retirement Plan Beneficiaries Act and in part by Perpetuities Act Dependants' Relief Act
Reciprocal Enforcement of Tax Judgments Act	1965	None	1980	None
Testators Family Maintenance Act	1945	4	1974	

*Since 1933 the Fire Insurance Policy Act and the Life Insurance Act have been the responsibility of the Association of Superintendents of Insurance of the Provinces of Canada (*see* 1933 Proceedings, pp. 12, 13) under whose aegis a great many amendments and a number of revisions have been made. The remarkable degree of uniformity across Canada achieved by the Conference in this field in the nineteen twenties has been maintained ever since by the Association.

**The Uniform Rules of the Road are now being reviewed and amended from time to time by the Canadian Conference of Motor Transport Authorities

TABLE III

UNIFORM ACTS NOW RECOMMENDED SHOWING THE JURISDICTIONS THAT HAVE ENACTED THEM IN WHOLE OR IN PART, WITH OR WITHOUT MODIFICATIONS, OR IN WHICH PROVISIONS SIMILAR IN EFFECT ARE IN FORCE

**indicates that the Act has been enacted in part.*

°*indicates that the Act has been enacted with modifications.*

ˣ*indicates that provisions similar in effect are in force.*

†*indicates that the Act has since been revised by the Conference.*

Accumulations Act—Enacted by N.B.ˣ *sub nom.* Property Act; Ont. ('66). Total: 2.

Assignment of Book Debts Act—Enacted by Man. ('29, '51, '57). Total: 1.

Bills of Sale Act—Enacted by Alta.† ('29); Man. ('29, '57); N.B.° ('52); Nfld.° ('55); N.W.T.° ('48); N.S. ('30); P.E.I.* ('47, '82). Total: 7.

Bulk Sales Act—Enacted by Alta.† ('22); Man. ('51); N.B.† ('27); Nfld.° ('55); N.W.T.† ('48); N.S.ˣ; Yukon ('56). Total: 7.

Child Abduction (Hague Convention) Act—Enacted by B.C. ('82); Man. ('82); N.B.ˣ ('82); Nfld. ('83); N.S. ('82); P.E.I.° ('84) *sub nom.* Custody Jurisdiction and Enforcement Act; Yukon ('81). Total: 7.

Child Status Act—Enacted by N.B. ('80) sub nom. Family Services Act; P.E.I. ('87). Total: 2.

Condominium Insurance Act—Enacted by B.C. ('74) *sub nom.* Strata Titles Act; Man. ('76); Yukon ('81). Total: 3.

Conflict of Laws Rules for Trusts Act

Conflict of Laws (Traffic Accidents) Act—Enacted by Yukon ('72). Total: 1.

Contributory Negligence Act—Enacted by Alta.† ('37); N.B.° ('25, '62); Nfld.° ('51); N.W.T.° ('50); N.S. ('26, '54); P.E.I.ˣ ('78); Sask. ('44); Yukon° ('55). Total: 8.

Criminal Injuries Compensation Act—Enacted by Alta.† ('69); B.C. ('72); N.B.ˣ ('71); Nfld.ˣ ('68); N.W.T. ('73); Ont. ('71); Yukon° ('72, '81). Total: 7.

Custody Jurisdiction and Enforcement Act—Enacted by Man. ('83); N.B.ˣ ('80); Nfld.° ('83); P.E.I.° ('84). Total: 4.

Defamation Act—Enacted by Alta.† ('47); B.C.* *sub nom.* Libel and Slander Act; Man. ('46); N.B.* ('52); Nfld.° ('83); N.W.T.° ('49); N.S.* ('60); P.E.I.° ('48); Yukon ('54, '81). Total: 9.

Dependants' Relief Act—Enacted by N.B.ˣ ('59); N.W.T.* ('74); Ont. ('73) *sub nom.* Succession Law Reform Act, 1977: Part V; P.E.I. ('74) *sub nom.* Dependants of a Deceased Person Relief Act; Yukon ('81). Total: 5.

Devolution of Real Property Act—Enacted by Alta. ('28); N.B.[o] ('34); N.W.T.[o] ('54); P.E.I.* ('39) *sub nom.* Probate Act: Part V; Sask. ('28); Yukon ('54). Total: 6.

Domicile Act—0.

Effect of Adoption Act—Enacted by N.B.[x] ('80); N.W.T. ('69); P.E.I.[x]. Total: 3.

Evidence Act—Enacted by Alta. ('47, '52, '58); B.C. ('32, '45, '47, '53, '77); Can. ('42, '43); Man.* ('57, '60); Nfld. ('54); N.W.T.[o] ('48); N.S. ('45, '46, '52); P.E.I.* ('39); Ont.* ('45, '46, '52, '54); Sask. ('45, '46, '47); Yukon[o] ('55). Total: 11.

Extra—Provincial Custody Orders Enforcement Act—Enacted by Alta. ('77); B.C. ('76); Man.[o] ('82); Nfld.[o] ('76); N.W.T. ('81); N.S. ('76); Ont. ('82); Sask.[o] ('77). Total: 8.

Family Support Act—Enacted by Yukon[x] ('81). Total: 1.

Fatal Accidents Act—Enacted by N.B.* ('69); N.W.T.† ('48); Ont. ('77); *sub nom.* Family Law Reform Act: Part V; P.E.I.[x]. Total: 4.

Foreign Judgments Act—Enacted by N.B.[o] ('50); Sask. ('34). Total: 2.

Frustrated Contracts Act—Enacted by Alta.† ('49); B.C. ('74); N.B. ('49); Nfld. ('56); N.W.T.† ('56); Ont. ('49); Yukon ('81). Total: 7.

Highway Traffic and Vehicles Act, Part III: Responsibility of Owner and Driver for Accidents—0.

Hotelkeepers Act—Enacted by N.B.[x]. Total: 1.

Human Tissue Gift Act—Enacted by Alta. ('73); B.C. ('72); N.B.[x]; Nfld.[o] ('71); N.W.T. ('66); N.S. ('73); Ont. ('71); P.E.I.[o] ('74, '81); Sask.[o] ('68); Yukon ('81). Total: 10.

Inter-Jurisdictional Child Welfare Orders Act

International Commercial Arbitration Act—Enacted by B.C.[o] ('86); Can. ('86); N.B. ('86); Nfld. ('86); N.W.T. ('86); N.S. ('86); Ont. ('86); P.E.I. ('86); Sask. ('86); Yukon ('86). Total: 10.

International Trusts Act

Interpretation Act—Enacted by Alta.[o] ('80); B.C. ('74); N.B.[x]; Nfld.[o] ('51); N.W.T.[o]† ('48); P.E.I.[o] ('81); Que.[x]; Sask.[o] ('43); Yukon* ('54). Total: 9.

Interprovincial Subpoenas Act—Enacted by Alta. ('81); B.C. ('76); Man. ('75); N.B.[o] ('79); Nfld.[o] ('79); N.W.T.[o] ('76); Ont. ('79); P.E.I. ('87); Sask.[o] ('77); Yukon ('81). Total: 10.

Intestate Succession Act—Enacted by Alta. ('28); B.C. ('25); Man.[o] ('27, '77) *sub nom.* Devolution of Estates Act; N.B.[o] ('26); Nfld. ('51); N.W.T.[o] ('48); Ont.[o] ('77) *sub nom.* Succession Law Reform Act: Part II; P.E.I.* ('39) *sub nom.* Probate Act: Part IV; Sask. ('28); Yukon[o] ('54). Total: 10.

Judgment Interest Act—Enacted by N.B.[x]; Nfld. ('83). Total: 2.

Jurors Act (Qualifications and Exemptions)—Enacted by B.C. ('77); *sub nom.* Jury Act; Man. ('77); N.B.[x]; Nfld. ('81); P.E.I.[o] ('81). Total: 5.

Legitimacy Act—Enacted by Alta. ('28, '60); B.C. ('22, '60); Man. ('28, '62); N.W.T.[o] ('49, '64); N.S.[x]; Ont. ('21, '62); P.E.I.* ('20) *sub nom.* Children's Act: Part I; Sask.[o] ('20, '61); Yukon* ('54). Total: 9.

Limitation of Actions Act—Enacted by Alta.[o] ('35); Man.[o] ('32, '46); N.B.* ('52); N.W.T.* ('48); P.E.I.* ('39); Sask. ('32); Yukon ('54). Total: 7.

Married Women's Property Act—Enacted by Man. ('45); N.B.[o] ('51); N.W.T. ('52, '77); Yukon[o] ('54). Total: 4.

Medical Consent of Minors Act—Enacted by N.B.[o] ('76). Total: 1.

Mental Health Act

Occupiers' Liability Act—Enacted by B.C. ('74); P.E.I.[o] ('84). Total: 2.

Partnerships Registration Act—Enacted by N.B.[o] ('51); P.E.I.[x]; Sask.[x] ('41) *sub nom.* Business Names Registration Act. Total: 3.

Pensions Trusts and Plans—Appointment of Beneficiaries—Enacted by Alta. ('58); Man. ('59); N.B. ('55); Nfld. ('58); N.S. ('60); Sask. ('57). Total: 6.

Perpetuities Act—Enacted by Alta. ('72); B.C. ('75); Man. ('59); Nfld. ('55); N.W.T.* ('68); N.S. ('59); Ont. ('66); Yukon ('81). Total: 8.

Personal Property Security Act—Enacted by Man. ('77); Sask.[o] ('79); Yukon[o] ('81). Total: 3.

Powers of Attorney Act—Enacted by B.C. ('79); Sask.[o] ('83). Total: 2.

Presumption of Death Act—Enacted by B.C. ('58, '77) *sub nom.* Survivorship and Presumption of Death Act; Man. ('68); N.B.[x] ('60); N.W.T. ('62, '77); N.S.[o] ('83); Yukon ('81). Total: 6.

Proceedings Against the Crown Act—Enacted by Alta.[o] ('59); Man. ('51); N.B.[o] ('52); Nfld.[o] ('73); N.S. ('51); Ont.[o] ('63); P.E.I.* ('73); Sask.[o] ('52). Total: 8.

Reciprocal Enforcement of Judgments Act—Enacted by Alta. ('25, '58); B.C. ('25, '59); Man. ('50, '61); N.B.[x] ('25, '51); Nfld.[o] ('60); N.W.T.* ('55); N.S.[o] ('73); Ont. ('29); P.E.I.[o] ('74); Sask. ('40); Yukon ('56, '81). Total: 11.

Reciprocal Enforcement of Maintenance Orders Act—Enacted by Alta. ('47, '58); B.C.[o] ('72); Man. ('46, '61, '83); N.B.† ('52); Nfld.[x] ('51, '61); N.W.T.[o] ('51); N.S.* ('49, '83); Ont.[o] ('59); P.E.I.[o] ('51, '83); Que. ('52); Sask. ('68, '81, '83); Yukon ('81). Total: 12.

Regulations Act—Enacted by Alta.[o] ('57); B.C. ('83); Can.[o] ('50); Man.[o] ('45); N.B.[o] ('62); Nfld.[o] ('77); N.W.T.[o] ('73); Ont.[o] ('44); Sask.[o] ('63, '82); Yukon[o] ('68). Total: 10.

Retirement Plan Beneficiaries Act—Enacted by Alta. ('77, '81); Man. ('76); N.B.[o] ('82); Ont. ('77) *sub nom.* Law Succession Reform Act: Part V; P.E.I.[x]; Yukon ('81). Total: 6.

Service of Process by Mail Act—Enacted by Alta.[x]; B.C.[o] ('45); Man.[x]; Sask.[x]. Total: 4.

Statutes Act—Enacted by B.C.[o] ('74); N.B.[o] ('73); P.E.I.[x]. Total: 3.

Survival of Actions Act—Enacted by Alta.[o] ('79); B.C.* *sub nom.* Estate Administration Act; N.B.* ('69); P.E.I.[o] ('78); Yukon ('81). Total: 5.

Survivorship Act—Enacted by Alta. ('48, '64); B.C.[o] ('39, '58); Man. ('42, '62); N.B.† ('40); Nfld. ('51); N.W.T. ('62); N.S. ('41); Ont. ('40); Sask. ('42, '62); Yukon ('81). Total: 10.

Testamentary Additions to Trusts Act—Enacted by Yukon ('69) *sub nom.* Wills Act,s 29. Total: 1.

Testators Family Maintenance Act—Enacted by 6 jurisdictions before it was superseded by the Dependants Relief Act.

Trade Secrets Act

Transboundary Pollution Reciprocal Access Act—Enacted by Colorado ('84); Man. ('85); Montana ('84); New Jersey ('84); P.E.I. ('85). Total: 5.

Trustee Investments Act—Enacted by B.C. ('59); Man.[o] ('65); N.B. ('71); N.W.T. ('71); N.S.* ('57); Sask. ('65); Yukon ('62, '81). Total: 7.

Variation of Trusts Act—Enacted by Alta. ('64); B.C. ('68); Man. ('64); N.W.T. ('63); N.S. ('62); Ont. ('59); P.E.I. ('63); Sask. ('69). Total: 8.

Vital Statistics Act—Enacted by Alta.[o] ('59); B.C.[o] ('62); Man.[o] ('51); N.B.[x] ('79); N.W.T.[o] ('52); N.S.[o] ('52); Ont. ('48); P.E.I.* ('50); Sask. ('50); Yukon[o] ('54). Total: 10.

Warehousemen's Lien Act—Enacted by Alta. ('22); B.C. ('52); Man. ('23); N.B.[x] ('23); Nfld. ('63); N.W.T.[o] ('48); N.S. ('51); Ont. ('24); P.E.I.[o] ('38); Sask. ('21); Yukon ('54). Total: 11.

Warehouse Receipts Act—Enacted by Alta. ('49); B.C.* ('45); Man.[o] ('46); N.B.[o] ('47); Nfld. ('63); N.S. ('51); Ont.[o] ('46). Total: 7.

Wills Act—Enacted by Alta.[o] ('60); B.C.[o] ('60); Man.[o] ('64); N.B.[o] ('59); Nfld. ('76); N.W.T.[o] ('52); Sask. ('31); Yukon[o] ('54). Total: 8.

—Conflict of Laws—Enacted by B.C. ('60); Man. ('55); Nfld. ('76); N.W.T. ('52); Ont. ('54). Total: 5.

—(Part 4) International—Enacted by Alta. ('76); Nfld. ('76). Total: 2.

Section 17—B.C.[o] ('79). Total: 1.

TABLE IV

LIST OF JURISDICTIONS SHOWING THE UNIFORM ACTS NOW RECOMMENDED ENACTED IN WHOLE OR IN PART, WITH OR WITHOUT MODIFICATIONS, OR IN WHICH PROVISIONS SIMILAR IN EFFECT ARE IN FORCE

**indicates that the Act has been enacted in part*

°*indicates that the Act has been enacted with modifications*

ˣ*indicates that provisions similar in effect are in force*

†*indicates that the Act has since been revised by the Conference*

Alberta

Bills of Sale Act† ('29); Bulk Sales Act† ('22); Contributory Negligence Act† ('37); Criminal Injuries Compensation Act† ('69); Defamation Act† ('47); Devolution of Real Property Act ('28); Evidence Act—Affidavits before Officers ('58), Foreign Affidavits ('52, '58), Photographic Records ('47), *Russell v. Russell* ('47); Extra-Provincial Custody Orders Enforcement Act ('77); Frustrated Contracts Act† ('49); Human Tissue Gift Act ('73); Interpretation Act° ('80); Interprovincial Subpoena Act ('81); Intestate Succession Act ('28); Legitimacy Act ('28, '60); Limitation of Actions Act° ('35); Pension Trusts and Plans—Appointment of Beneficiaries ('58); Perpetuities Act ('72); Proceedings Against the Crown Act° ('59); Reciprocal Enforcement of Judgments Act ('25, '58); Reciprocal Enforcement of Maintenance Orders Act ('47, '58); Regulations Act° ('57); Retirement Plan Beneficiaries Act ('77, '81); Service of Process by Mail Actˣ; Survivorship Act ('48, '64); Variation of Trusts Act ('64); Vital Statistics Act° ('59); Warehousemen's Lien Act ('22); Warehouse Receipts Act ('49); Wills Act° ('60); International Wills ('76). Total: 32.

British Columbia

Child Abduction (Hague Convention) Act ('82); Criminal Injuries Compensation Act ('72); Condominium Insurance Act ('74) *sub nom.* Condominium Act*; Defamation Act* *sub nom.* Libel and Slander Act; Evidence—Affidavits before Officers: Foreign Affidavits* ('53); *Hollington v. Hewthorne* ('77) Judicial Notice of Acts, etc. ('32), Photographic Records ('45), *Russell v. Russell* ('47); Extra-Provincial Custody Orders Enforcement Act ('76) *sub nom.* Family Relations Act*; Frustrated Contracts Act ('74) *sub nom.* Frustrated Contract Act; Human Tissue Gift Act ('72); International Commercial Arbitration Act° ('86); Interpretation Act ('74); Interprovincial Subpoenas Act ('76) *sub nom.* Subpoena Interprovincial Act*; Intestate Succession Act ('25) *sub nom.* Estate Administration Act*; Jurors Qualification Act ('77) *sub nom.* Jury Act; Legitimacy Act ('22, '60); Occupiers' Liability Act ('74) *sub*

nom. Occupiers' Liability Act*; Perpetuities Act ('75) *sub nom.* Perpetuity Act*; Powers of Attorney Act ('79) *sub nom.* Power of Attorney Act*; Presumption of Death Act ('58, '77) *sub nom.* Survivorship and Presumption of Death Act; Reciprocal Enforcement of Judgments Act ('25, '59) *sub nom.* Court Order Enforcement Act*; Reciprocal Enforcement of Maintenance Orders Act° ('72) in Regulations under Sec. 7008 Family Relations Act; Regulations Act ('83); Service of Process by Mail Act° ('45) *sub nom.* Small Claims Act*; Survival of Actions Act *sub nom.* Estate Administration Act*; Statutes Act° ('74) Part in Constitution Act; Part in Interpretation Act; Survivorship Act° ('39, '58) *sub nom.* Survivorship and Presumption of Death Act*; Provisions now in Wills Variation Act*; Trustee (Investments) ('59) Provisions now in Trustee Act; Variation of Trusts Act ('68) *sub nom.* Trust Variation Act; Vital Statistics Act° ('62); Warehousemen's Lien Act ('52) *sub nom.* Warehouse Lien Act*; Warehouse Receipts Act* ('45); Wills Act° ('60); Wills—Conflict of Laws ('60), Sec. 17° ('79). Total: 35.

Canada

Evidence—Foreign Affidavits ('43), Photographic Records ('42); International Commercial Arbitration Act ('86); Regulations Act° ('50), superseded by the Statutory Instruments Act, S.C. 1971, c. 38. Total: 4.

Manitoba

Assignment of Book Debts Act ('29, '51, '57); Bills of Sale Act ('29, '57); Bulk Sales Act ('51); Child Abduction (Hague Convention) Act ('82); Condominium Insurance Act ('76); Custody Jurisdiction and Enforcement Act ('83); Defamation Act ('46); Extra Provincial Custody Orders Enforcement Act° ('82); Evidence Act* ('60); Affidavits before Officers ('57); Interprovincial Subpoenas Act ('75); Intestate Succession Act° ('27, '77) *sub nom.* Devolution of Estates Act; Jurors' Qualifications Act ('77); Legitimacy Act ('28, '62); Limitation of Actions Act° ('32, '46); Married Women's Property Act ('45); Pension Trusts and Plans — Appointment of Beneficiaries ('59); Perpetuities ('59); Personal Property Security Act ('77); Presumption of Death Act° ('68); Proceedings Against the Crown Act ('51); Reciprocal Enforcement of Judgments Act ('50, '61); Reciprocal Enforcement of Maintenance Orders Act ('46, '61, '83); Regulations Act° ('45); Retirement Plan Beneficiaries Act ('76); Service of Process by Mail Act°; Survivorship Act ('42, '62); Transboundary Pollution Reciprocal Access Act ('85); Trustee (Investments)° ('65); Variation of Trusts Act ('64); Vital Statistics Act° ('51); Warehousemen's Lien Act ('23); Warehouse Receipts Act° ('46); Wills Act° ('64), Conflict of Laws ('55). Total: 34.

New Brunswick

Accumulations Act[x] *sub nom.* Property Act; Bills of Sales Act[o] ('52); Bulk Sales Act† ('27); Canada U.K. Convention on the Recognition and Enforcement of Judgments[o] ('82); Child Status[x] ('80) *sub nom.* Family Services Act; Contributory Negligence Act ('25)[o] ('62); Criminal Injuries Compensation Act[x] ('71); Custody Jurisdiction and Enforcement Act[x] ('80) *sub nom.* Family Services Act; Defamation Act* ('52); Dependants Relief Act[x] ('59); Devolution of Real Property Act[o] ('34) *sub nom.* Devolution of Estates Act; Effect of Adoption Act[x] ('80) *sub nom.* Family Services Act; Fatal Accidents Act* ('69); Family Support Act[x] ('80) *sub nom.* Family Services Act; Foreign Judgments Act[o] ('50); Highway Traffic Act[x]; Hotelkeepers Act[x] *sub nom.* Innkeepers Act; Human Tissue Gift Act[x] *sub nom.* Human Tissue Act; International Commercial Arbitration Act ('86); Interpretation Act[x]; Interprovincial Subpoenas Act[o] ('79); Intestate Succession Act[o] ('26) *sub nom.* Devolution of Estates; Judgment Interest[x] *sub nom.* Judicature Act, see also Rules of Court; Jurors Qualification Act[x] *sub nom.* Jury Act; Limitations of Actions* ('52); Married Women's Property Act[o] ('51); Medical Consent of Minors[o] ('76); Partnership Registration Act[o] ('51); Presumption of Death Act[x] ('60); Proceedings Against the Crown[o]('52); Reciprocal Enforcement of Judgments ('25),[x] ('51); Reciprocal Enforcement of Maintenance Orders† ('52); Reciprocal Recognition and Enforcement of Judgments[o] ('84); Regulations Act[o] ('62); Retirement Plan Beneficiaries[o] ('82); Sale of Goods[x]; Statutes Act[o] ('73) *sub nom.* Interpretation Act; Survival of Actions Act* ('69); Survivorship Act† ('40); Trustees (Investments) ('71); Vital Statistics[x] ('79); Warehousemen's Lien Act[x] ('23); Warehouse Receipts[o] ('47); Wills Act[o] ('59). Total: 38.

Newfoundland

Bills of Sale Act[o] ('55); Bulk Sales Act[o] ('55); Contributory Negligence Act[o] ('51); Criminal Injuries Compensation Act[x] ('68); Custody Jurisdiction and Enforcement Act[o] ('83); Defamation Act ('83); Evidence – Affidavits before Officers ('54); Extra-Provincial Custody Orders Enforcement Act[o] ('76); Foreign Affidavits ('54) *sub nom.* Evidence Act; Frustrated Contracts Act ('56); Human Tissue Gift Act[o] ('71); International Child Abduction Act ('83); International Commercial Arbitration Act ('86); International Wills ('76) *sub nom.* Wills Act; Interpretation Act[o] ('51); Interprovincial Subpoena Act[o] ('76); Intestate Succession Act ('51); Judgment Interest Act[o] ('83); Jurors Act (Qualifications and Exemptions) ('81) *sub nom.* Jury Act; Legitimacy Act[ox]; Pension

Trusts and Plans–Appointment of Beneficiaries ('58) *sub nom.* Pension Plans (Designation of Beneficiaries) Act; Perpetuities Act ('55); Photographic Records ('49) *sub nom.* Evidence Act; Proceedings Against the Crown Act[o] ('73); Reciprocal Enforcement of Judgments Act[o] ('60); Reciprocal Enforcement of Maintenance Orders Act[x] ('51, '61) *sub nom.* Maintenance Orders (Enforcement) Act; Regulations Act[o] ('77) *sub nom.* Statutes and Subordinate Legislation Act; Survivorship Act ('51); Warehousemen's Lien Act ('63); Warehouse Receipts Act ('63); Wills-Conflict of Laws Act ('76) *sub nom.* Wills Act. Total: 31.

Northwest Territories

Bills of Sale Act[o] ('48); Bulk Sales Act† ('48); Contributory Negligence Act[o] ('50); Criminal Injuries Compensation Act ('73); Defamation Act[o] ('49); Dependants' Relief Act* ('74); Devolution of Real Property Act[o] ('54); Effect of Adoption Act ('69) *sub nom.* Child Welfare Ordinance: Part IV; Extra-Provincial Custody Orders Enforcement Act ('81); Evidence Act[o] ('48); Fatal Accidents Act† ('48); Frustrated Contracts Act† ('56); Human Tissue Gift Act ('66); International Commercial Arbitration Act ('86); Interpretation Act[o]† ('48); Interprovincial Subpoenas Act[o] ('79); Intestate Succession Act[o] ('48); Legitimacy Act[o] ('49, '64); Limitation of Actions Act* ('48); Married Women's Property Act ('52, '77); Perpetuities Act* ('68); Presumption of Death Act ('62, '77); Reciprocal Enforcement of Judgments Act* ('55); Reciprocal Enforcement of Maintenance Orders Act[o] ('51); Regulations Act[o] ('71); Survivorship Act ('62); Trustee (Investments) ('71); Variation of Trusts Act ('63); Vital Statistics Act[o] ('52); Warehousemen's Lien Act[o] ('48); Wills Act[o] — General (Part II) ('52), — Conflict of Laws (Part III) ('52) - Supplementary (Part III) ('52). Total: 33.

Nova Scotia

Bills of Sale Act ('30); Bulk Sales Act[x]; Child Abduction (Hague Convention) Act ('82); Contributory Negligence Act ('26, '54); Defamation Act* ('60); Evidence—Foreign Affidavits ('52), Photographic Records ('45), *Russell v. Russell* ('46); Human Tissue Gift Act ('73); International Commercial Arbitration Act ('86); Legitimacy Act[x]; Pension Trusts and Plans — Appointment of Beneficiaries ('60); Perpetuities ('59); Presumption of Death Act[o] ('63); Proceedings Against the Crown Act ('51); Reciprocal Enforcement of Judgments Act[o] ('73); Reciprocal Enforcement of Maintenance Orders Act* ('49, '83); Survivorship Act ('41); Trustee Investments* ('57); Variation of Trusts Act ('62); Vital Statistics Act[o] ('52); Warehousemen's Lien Act ('51); Warehouse Receipts Act ('51). Total: 21.

Ontario

Accumulations Act ('66); Criminal Injuries Compensation Act ('71) *sub nom.* Compensation for Victims of Crime Act[o] ('71); Dependants' Relief Act ('73) *sub nom.* Succession Law Reform Act: Part V; Evidence Act* ('60)—Affidavits before Officers ('54), Foreign Affidavits ('52, '54), Photographic Records ('45), *Russell v. Russell* ('46); Extra-Provincial Custody Orders Enforcement Act ('82); Fatal Accidents Act ('77) *sub nom.* Family Law Reform Act: Part V; Frustrated Contracts Act ('49); Human Tissue Gift Act ('71); International Commercial Arbitration Act ('86); Interprovincial Subpoenas Act ('79); Intestate Succession Act[o] ('77) *sub nom.* Succession Law Reform Act: Part II; Legitimacy Act ('21, '62), rep. '77; Perpetuities Act ('66); Proceedings Against the Crown Act[o] ('63); Reciprocal Enforcement of Judgments Act ('29); Reciprocal Enforcement of Maintenance Orders Act[o] ('59); Regulations Act[o] ('44); Retirement Plan Beneficiaries Act ('77) *sub nom.* Succession Law Reform Act: Part V; Survivorship Act ('40); Variation of Trusts Act ('59); Vital Statistics Act ('48); Warehousemen's Lien Act ('24); Warehouse Receipts Act[o] ('46); Wills—Conflict of Laws ('54). Total: 29.

Prince Edward Island

Bills of Sale Act*('47, '82); Child Abduction (Hague Convention) *sub nom.* Custody Jurisdiction and Enforcement Act[o] ('84); Child Status Act ('87); Contributory Negligence Act[x] ('78); Defamation Act[o] ('48); Dependants' Relief Act[o] ('74) *sub nom.* Dependants of a Deceased Person Relief Act; Devolution of Real Property Act* ('39) *sub nom.* Part V of Probate Act; Effect of Adoption Act[x]; Evidence Act* ('39); Fatal Accidents Act[x]; Human Tissue Gift Act[o] ('74, '81); International Commercial Arbitration Act ('86); Interpretation Act[o] ('81); Interprovincial Subpoenas Act; Intestate Succession Act *sub nom.* Part IV Probate Act* ('39); Jurors Act (Qualifications and Exemptions)[o] ('81); Legitimacy Act* ('20) *sub nom.* Part I of Children's Act; Limitation of Actions Act* ('39); Occupiers' Liability Act[o] ('84); Partnerships Registration Act[x]; Proceedings Against the Crown Act* ('73); Reciprocal Enforcement of Judgments Act[o] ('74); Reciprocal Enforcement of Maintenance Orders Act[o] ('51, '83); Retirement Plan Beneficiaries Act[x]; Statutes Act[x]; Survival of Actions Act[x]; Transboundary Pollution (Reciprocal Access) Act ('85); Variation of Trusts Act ('63); Vital Statistics Act* ('50); Warehousemen's Lien Act[o] ('38). Total: 22.

Quebec

The following is a list of Uniform Acts which have some equivalents in the laws of Quebec. With few exceptions, these equivalents are in

substance only and not in form, Bulk Sales Act: see a. 1569a and s.C.C. (S.Q. 1910, c. 39, mod. 1914, c. 63 and 1971, c. 85, s. 13) – similar; Criminal Injuries Compensation Act; see Loi sur l'indemnisation des victimes d'actes criminels, L.R.Q. (1977) ch. I-6 – quite similar; Evidence Act; Affirmation in lieu of oath: see a. 299 C.P.C. – similar; Judicial Notice of Acts, Proof of State Documents: see a. 1207 C.C. similar to «Proof of State Documents»; Human Tissue Gift Act: see a. 20, 21, 22 C.C. – similar: Interpretation Act: see Loi d'interprétation L.R.Q. (1977) ch. I-16 particularly, a. 49: cf. a. 6(1) of the Uniform Act, a. 40: cf. a. 9 of the Uniform Act, a. 39 para. 1: cf a. 7 of the Uniform Act, a. 41: cf a. 11 of the Uniform Act, a. 42 para. 1: cf a. 13 of the Uniform Act – these provisions are similar in both Acts; Partnerships Registration Act: see Loi sur les déclarations des compagnies et sociétés, L.R.Q. (1977) ch. D-1 – similar; Presumption of Death Act: see a. 70, 71 and 72 C.C. – somewhat similar: Service of Process by Mail Act: see a. 138 and 140 C.P.C. – s. 2 of the Uniform Act is identical; Trustee Investments: see a. 981a et.sq. C.C. – very similar; Warehouse Receipts Act: see Loi sur les connaissements L.R.Q. (1977) ch. C-53 – s .23 of the Uniform Act is vaguely similar; Wills Act: see C.C. a. 842 para. 2: cf. s. 7 of the Uniform Act, a. 864 para. 2: cf. s. 15 of the Uniform Act, a. 849: cf. s. 6(1) of the Uniform Act, a. 854 para. 1: cf. ofs. 8(3) of the Uniform Act – which are similar.

NOTE:

Many other provisions of the Quebec Civil Code or of other statutes bear resemblance to the Uniform Acts but are not sufficiently identical to justify a reference. Obviously, most of these subject matters are covered one way or another in the laws of Quebec.

Saskatchewan

Contributory Negligence Act ('44); Devolution of Real Property Act ('28); Evidence—Foreign Affidavits ('47), Photographic Records ('45), *Russell v. Russell* ('46); Extrajudicial Custody Order Act[o] ('77); Foreign Judgments Act ('34); Human Tissue Gift Act[o] ('68); International Commercial Arbitration Act ('86); Interpretation Act[o] ('43); Interprovincial Subpoenas Act[o] ('77); Intestate Succession Act ('28); Legitimacy Act[o] ('20, '61); Limitation of Actions Act ('32); Partnership Registration Act[x] ('41) *sub nom.* Business Names Registration Act; Pension Trusts and Plans—Perpetuities ('57); Personal Property Security Act[o] ('79); Powers of Attorney Act[o] ('83); Proceedings Against the Crown Act[o] ('52); Reciprocal Enforcement of Judgments Act ('40); Reciprocal Enforcement of Maintenance Orders Act ('68, '81, '83); Regulations Act[o] ('63, '82);

Service of Process by Mail Act[x]; Survivorship Act ('42, '62); Trustee (Investments) ('65); Variation of Trusts Act ('69); Vital Statistics Act ('50); Warehousemen's Lien Act ('21); Wills Act ('31). Total: 28.

Yukon Territory

Bulk Sales Act ('56); Child Abduction (Hague Convention) Act ('81); Condominium Insurance Act ('81); Conflict of Laws (Traffic Accidents) Act ('72); Contributory Negligence Act[o] ('55); Criminal Injuries Compensation Act[o] ('72, '81) *sub nom.* Compensation for Victims of Crime Act; Defamation Act ('54, '81); Dependants Relief Act ('81); Devolution of Real Property Act ('54); Evidence Act[o] ('55), Foreign Affidavits ('55), Judicial Notice of Acts, etc. ('55), Photographic Records ('55), *Russell v. Russell* ('55); Family Support Act[x] ('81); *sub nom.* Matrimonial Property and Family Support Act; Frustrated Contracts Act ('81); Human Tissue Gift Act ('81); International Commercial Arbitration Act ('86); Interpretation Act* ('54); Interprovincial Subpoena Act ('81); Intestate Succession Act[o] ('54); Legitimacy Act* ('54); Limitation of Actions Act ('54); Married Women's Property Act[o] ('54); Perpetuities Act[o] ('81); Personal Property Security Act[o] ('81); Presumption of Death Act ('81); Reciprocal Enforcement of Judgments Act ('56, '81); Reciprocal Enforcement of Maintenance Orders Act ('81); Regulations Act[o] ('68); Retirement Plan Beneficiaries Act ('81); Survival of Actions Act ('81); Survivorship Act ('81); Testamentary Additions to Trusts ('69) see Wills Act, s. 29; Trustee (Investments) ('62, '81); Vital Statistics Act[o] ('54); Warehousemen's Lien Act ('54); Wills Act[o] ('54). Total: 38.

CUMULATIVE INDEX

EXPLANATORY NOTE

This index specifies the year or years in which a matter was dealt with by the Conference.

If a subject was dealt with in three or more consecutive years, only the first and the last years of the sequence are mentioned in the index.

The inquiring reader, having learned from the cumulative index the year or years in which the subject in which he is interested was dealt with by the Conference, can then turn to the relevant annual *Proceedings* of the Conference and ascertain from its index the pages of that volume on which his subject is dealt with.

If the annual index is not helpful, check the relevant minutes of that year.

Thus the reader can quickly trace the complete history in the Conference of his subject.

The cumulative index is arranged in parts:

Part I. Conference: General
Part II. Legislative Drafting Section
Part III. Uniform Law Section
Part IV. Criminal Law Section

An earlier compilation of the same sort is to be found in the 1939 *Proceedings* at pages 242 to 257. It is entitled: TABLE AND INDEX OF MODEL UNIFORM STATUTES SUGGESTED, PROPOSED, REPORTED ON, DRAFTED OR APPROVED, AS APPEARING IN THE PRINTED PROCEEDINGS OF THE CONFERENCE 1918-1939.

PART I

CONFERENCE: GENERAL

PART II

LEGISLATIVE DRAFTING SECTION

PART III

UNIFORM LAW SECTION

PART IV

CRIMINAL LAW SECTION

Subjects considered each year are listed in the minutes of the year and published in the Proceedings of that year.

INDEX